U.S. Department of Labor

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Issue Date: 02 December 2003

CASE NO.: 2002-SCA-0006

In the Matter of:

U.S. DEPARTMENT OF LABOR,
Plaintiff

v.

LAWN RESTORATION CORPORATION d/b/a LAWN RESTORATION SERVICE, INC. and LAWN RESTORATION SERVICES, INC., a Corporation; and
JEFFREY JONES, Individually and as Owner and/or President of the Corporate Respondent,
Respondents.

APPEARANCES:

Elizabeth Lopes Beason, Attorney
Linda Ghosal, Attorney
For the Department of Labor

Barbara E. Brown, Attorney
Johnny M. Howard, Attorney
For Respondents

BEFORE:
Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act of 1965 ("SCA" or "the Act") as amended, (41 U.S.C. § 351 *et seq*.), the Contract Work Hours and Safety Standards Act of 1962 ("CWHSSA") as amended, (40 U.S.C. § 327, *et seq*.), and the regulations issued thereunder at 29 C.F.R. Parts 4-6.

Procedural Background

On April 26, 2002, the Department of Labor ("DOL" or "the Agency") filed a complaint seeking recovery of wages and fringe benefits allegedly owed by Lawn Restoration Corporation and Jeffrey Jones ("Respondents" or "Lawn Restoration") to certain workers employed pursuant to a contract for lawn maintenance services performed for the government of the District of Columbia.

On January 27, 2003, I issued an order granting the Agency's motion for partial summary judgment, in which I made various findings of fact and conclusions of law, all of which are incorporated herein by reference. With regard to my conclusions of law, I determined that: (1) I have jurisdiction over this case under the SCA and CWHSSA, and those Acts apply to the subject contract; (2) Jeffrey Jones is a "party responsible" and personally liable for any violations of applicable statutes and regulations by Lawn Restoration with respect to the subject contract; (3) Respondents failed to pay some of their employees the minimum prevailing wage rate and overtime rate; (4) Respondents failed to pay any of their employees who worked on the subject contract fringe benefits, as required by the contract and the SCA; and (5) Respondents improperly deducted one-half hour for two fifteen minute breaks from the daily total of hours worked by employees performing work under the contract. No findings or conclusions were made at that time with respect to the amount of back wages and fringe benefits owed by Respondents to employees covered by the provisions of the subject contract or whether debarment was required or appropriate under either the SCA, the CWHSSA, or both.

A hearing was held in Washington, D.C., between January 28 and February 3, 2003. The parties were afforded a full opportunity to adduce testimony, offer documentary evidence, submit oral arguments, and file post-hearing briefs. The following exhibits were admitted into evidence: Department of Labor's Exhibits ("DX__") 1- 29 and Respondents' Exhibits ("RX__") 1-63. Post-hearing briefs were received from the Agency on April 8, 2003 and from Respondents on April 29, 2003. A post-hearing reply brief was also filed by DOL on May 16, 2003.

I. ISSUES

1. What is the amount of unpaid wages and fringe benefits owed by Respondents to employees who performed services under the contract resulting from Respondents' failure to comply with the SCA and CWHSSA?

2. Whether debarment of Respondents is warranted under the SCA, CWHSSA, or both?

3. Whether Respondents are liable for prejudgment interest on unpaid wages due employees who performed services under the contract?

II. SUMMARY OF THE EVIDENCE

Jeffrey Jones is the sole owner and CEO of Lawn Restoration, a company which provides lawn maintenance services to customers in the Washington, D.C. metropolitan area. In March 2001, Lawn Restoration entered into a contract with the District of Columbia government whereby it agreed to maintain the grounds of various parks and recreational facilities in D.C. for an initial period beginning May 31, 2000 and ending March 14, 2001 (the "base year"), which was later extended from March 14, 2001 through March 14, 2002 ("option year one").[1]

In order to supplement his staff with sufficient workers to perform work required by the contract, Jones arranged through an agency named "Amigos" to hire 23 Mexican workers

[1] The contract was later extended for the second option year from March 15, 2002 to March 14, 2003 (DX 40).

brought here under H-2B visas (hereinafter "H-2B workers").[2] He thereafter housed these workers in one of two locations – a residence in the Anacostia area of Washington, D.C. at 2260 High Street, SE and a second house located at 4909 Taylor Street, in nearby Bladensburg, Maryland – and utilized their services in performing work under the D.C. contract.

Contrary to the requirements of the contract which is the subject of this litigation, as well as various provisions of the SCA, CWHSSA, and applicable regulations, Respondents failed to pay covered workers the prevailing minimum wages and fringe benefits, including health and welfare benefits and holiday pay, failed to pay them the applicable overtime rate for all hours worked in excess of forty hours during any one workweek, failed to pay some employees for all hours they worked performing services under the contract, and made inappropriate deductions from certain employees' compensation. The specific testimony and documentary evidence establishing these violations is recounted below.

Jean Wright

Jean Wright testified that she is a Contracting Officer with the District of Columbia's Office of Contracting and Procurement and had been working in that position for about two years at the time of the formal hearing (Tr. 7). Wright further testified that she worked as a Contracting Specialist with the D.C. Government for over ten years prior to becoming a Contracting Officer, she has a Masters degree in administration, and she has taken numerous procurement classes. *Ibid*.

According to Wright, Respondents were initially awarded the subject contract on March 14, 2000 for a base year beginning May 1, 2000 and ending March 14, 2001.[3] Thereafter, on March 6, 2001, Respondents were awarded an extension on the contract for the period March 14, 2001 through March 14, 2002 (DX 1; DX 3). The contract called for the provision of lawn maintenance services in D.C. parks and recreational facilities. *Ibid.* Wright testified that she approved the award of the contract before leaving for vacation but was not the individual who actually signed the contract (Tr. 58). She further testified that it was the ordinary practice of her office to include a wage determination among the attachments sent out to prospective contractors along with the invitations for bids, and that the contractor is given a package of every document identified as an attachment to the contract when the contractor and Contracting Officer sign the contract (Tr. 58, 60-2, DX 1, DX 2). Wright testified that she had no personal knowledge of what procedure was followed with regard to the Lawn Restoration contract (Tr. 62).

The wage determination applicable to the subject contract (No. DC942103) prescribes a minimum wage of $9.05 for "Laborer, Grounds Maintenance" workers, which is the appropriate classification of the workers in this case (Tr. 143-44, DX 2 at 81, 84). The wage determination

[2] The Immigration and Nationality Act ("INA") precludes the use of nonimmigrant alien workers to fill particular jobs in the United States unless no qualified American workers are available to fill those jobs and filling the jobs with a nonimmigrant alien would not adversely affect the wages or working conditions of similarly employed U.S. workers. Employers wishing to hire nonimmigrant workers under H-2B visas must go through a labor certification process for the temporary employment of nonimmigrant aliens in the U.S. in occupations other than agriculture, logging, or registered nursing. *See* 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184; 20 C.F.R. Part 655, Subpart A

[3] This contract term is specified in a modification that became effective March 13, 2001 (DX 1).

further requires payment to these workers of $1.63 per hour for health and welfare benefits, and identifies a minimum of ten paid holidays per year that must be compensated (DX 2 at 90).

Ingrid Quiles

Ingrid Quiles testified that she has been working as a Bilingual Compliance Officer with DOL since May of 2000 and acted as a translator in this case, assisting Ron Zylstra, the lead investigator on the subject contract, with the interviewing of Respondents' H-2B employees (Tr. 65, 70-3). In particular, she interviewed Isaac Lopez, Luis Campos, Romero Coatzozon, Erasmo Luis Fernandez, Benito Murillo, and Pedro Chavez (twice) using written questions given to her by Zylstra (Tr. 71-6, DX 21, 13(c), 15(b), 27). Quiles recorded employees' answers in Spanish and gave them an opportunity to read her notes and to correct any inaccuracies prior to signing the statements (Tr. 72, 78).

Quiles further testified that she visited the two houses in Anacostia, D.C., and Bladensburg, Maryland, where the H-2B employees resided (Tr. 81-2). She recalled that the Bladensburg house was regular in size, but could not elaborate on its condition (Tr. 81). She had visited the house in Anacostia on three occasions (September 27 - 28 and October 2, 2001) to conduct the interviews (Tr. 81-2). In her observation, the house was in a "deplorable" condition. *Ibid.* From the outside it appeared to be "abandoned" because the grass was uncut and the door was broken. *Ibid.* In the living room, there was "no lighting at all, hardly any furniture, and the furniture that they had . . . was all broken." *Ibid.* Furthermore, she saw a rat while conducting the interviews. *Ibid.*

On cross-examination, Quiles testified that, to her knowledge, of all the individuals interviewed in Anacostia and Bladensburg in September and October 2001, only two were still working for Lawn Restoration (Pedro Chavez and Luis Campos) (Tr. 88, 91-3, DX 21). Most of the interviewed workers had stopped working for Respondents around the end of July 2001 (Tr. 90-1, DX 21).[4] Coatzozon continued to live in the Anacostia house after his employment ended because he did not have enough money to go back to Mexico (Tr. 89). According to the workers' statements, Respondents had been deducting $87.50 every two weeks from their paychecks for rent (DX 21). During the interviews, employees were asked whether their working hours were more or less the same as the hours reflected in a diary maintained by Pedro Chavez, but Quiles did not show them the diary herself (Tr. 91-2, DX 27).

At the conclusion of the hearing, Quiles translated suspension notices issued by Jeffrey Jones to Jorge Cruz-Norberto, Pedro Hernandez, and Jaime Lara, stating that Respondents "prohibited [the workers from taking] 30 minutes of lunch and 15 minutes of rest period" (Tr. 921, RX 35).

Quiles also translated a portion of Respondents' employee manual which stated that "participation of the benefits of the company with the . . . exemption of health and welfare benefits will be available after [the workers] have completed the six months of probationary period" (Tr. 924, DX 38).

[4] Carmona, Fernandez, Norberto, and Coatzozon; Benito Vasquez stopped working on 8/23/01. *Ibid.*

On cross-examination, Quiles acknowledged that Jeffrey Jones's signature does not appear on the suspension notices issued to the three employees for lunch time violations (Tr. 926, RX 35). She also testified that none of the six or seven H-2B workers she interviewed mentioned being given an employee manual (Tr. 928-30, DX 21).

Eva Gross

Eva Gross testified that she has worked in her current position as a Wage and Hour Bilingual Compliance Specialist at the Agency for approximately a year and a half (Tr. 95-6). During the course of DOL's investigation in this case, she assisted Ron Zylstra in interviewing Agostin Chavez Carmona and Jorge Luis Cruz Norberto on October 2, 2001 at the Anacostia house on High Street (Tr. 101, DX 21). She recorded the workers' statements and each worker was given an opportunity to read and correct any inaccuracies in her notes prior to signing them (Tr. 104). Gross stated that the interviewees were shown the diary of Pedro Chavez during the interviews and asked whether they worked similar hours (Tr. 109). Chavez was with Zylstra and Gross when they interviewed the H-2B workers at the house (Tr. 110).

When asked about her impressions of the Anacostia house, Gross testified that the house appeared abandoned from the outside because the grass was very high (Tr. 106). In the dining room she observed a card table and three metal chairs. *Ibid.* She also recalled that the lighting was very poor, the furniture seemed old, and there was a "bare minimum" of furnishings in other parts of the house (Tr. 105-06). Gross also testified that she noticed a hole in the ceiling. *Ibid.*

Isaac Lopez Vasquez[5]

Vasquez's employment with Lawn Restoration began on April 4, 2001 and continued through the time he was interviewed by DOL investigators on September 21, 2001 (Tr. 116). He stated that he lived in Respondents' Anacostia house for two or three months and said the house was originally rented by Jeffrey Jones, who then rented it to Vasquez and 22 other H-2B workers (Tr. 116-17). Vasquez indicated that the Anacostia house had only three rooms and all workers had to share mattresses which were placed on the floor in the three rooms. *Ibid.* Every two weeks, according to Vasquez, $87.50 was deducted from each H-2B worker's paycheck for rent. *Ibid.* When Vasquez moved to the Bladensburg house with nine other workers, Respondents continued to deduct the same amount from his paycheck. *Ibid.*

Vasquez stated that Respondents' supervisor picked up him and the other workers every day between 5:00 and 8:00 a.m. and then drove them to the central office. *Ibid.* Immediately upon arrival, the workers loaded machinery and tools into the truck. They then drove to a gas pump to obtain fuel for the equipment and thereafter drove to the first work site. *Ibid.* According to Vasquez, starting on July 5, 2001, Lawn Restoration stopped paying workers for the time spent traveling from the central office to the first work site in the morning, as well as for the time consumed on the return trip to the office in the afternoon. *Ibid.* Vasquez further stated that Respondents did pay for 15 minutes consumed loading and unloading equipment in the morning and afternoon. *Ibid.* Sometime in mid-July, however, Respondents started deducting

[5] At the hearing, Eva Desrosiers, a court-certified interpreter, translated for the record a September 21, 2001 statement of Isaac Lopez Vasquez written in Spanish (Tr. 113, DX 15(b)).

one hour for lunch despite the fact that the workers did not take a full hour for lunch. *Ibid.* According to Vasquez, Respondents did not require workers to buy uniforms, and there were no deductions for tools. *Ibid.*

Ronald J. Zylstra

During his direct examination, Ronald Zylstra testified that he has been a Compliance Officer for the Agency's Wage and Hour Division since 1985 (Tr. 120). Zylstra testified that he received approximately six weeks of training on interviewing techniques and other aspects of his job, has a Bachelor's degree in political science and history, and has a Master's degree in public administration (Tr. 120-21).

According to Zylstra, he first attempted to contact Jeffrey Jones by telephone in early to mid-September 2001, but was unsuccessful (Tr. 130). He then sent Jones a letter dated September 28, 2001 requesting that Jones appear at a compliance review meeting on October 9, 2001 and produce a number of documents (Tr. 130-1, DX 20). The letter instructed Jones to complete an enclosed form and fax it to Zylstra together with his most recent payroll records (Tr. 168-69, DX 26). Jones filled out the form and returned it to Zylstra via facsimile on October 5, 2003 as requested. On this form, Jones indicated that Lawn Restoration did not have any salaried employees and that employees were paid for a 30-minute lunch break (Tr. 132, DX 26). However, Jones initially failed to submit the payroll records and instead faxed a time record for the most recent pay period (Tr. 170). The letter also instructed Jones to make available at the October 9th meeting a number of documents, including payroll and corresponding time records for all employees for the past 24 months, and a list of all current employees, with their addresses and phone numbers (RX 8). As of the time of the October 9, 2001 meeting, Jones had submitted some of the documents requested by Zylstra, but not the time sheets (Tr. 139-40; 171-73). Zylstra testified that he repeatedly requested the names and addresses of the non-H-2B workers, but Jones never provided the information to him at any time during the investigation (Tr. 142, 175, 181).[6] Zylstra did obtain Jones's consent to interview H-2B workers, and eight workers were subsequently interviewed (Tr. 175-76). Zylstra never talked to any non-H-2B workers during the course of his investigation, but he did mail written "interview" forms to them after he concluded the investigation when requested by the Agency's Solicitor's Office to do so (Tr. 177-78). Zylstra testified he never interviewed any of Respondents' supervisors (Tr. 180).

Zylstra testified that during their October 9, 2001 meeting, Jones told him that Respondents had no other government contracts or any commercial work, which led Zylstra to conclude that all of Respondents' work was performed under the subject contract (Tr. 135-38, 201, 204, DX 19).[7] He testified that subsequent employee interviews confirmed Jones's statement (Tr. 136). According to Zylstra, Jones stated that the hourly pay rate of his employees ranged from $8 and up and he was unaware that the contract required Respondents to provide

[6] On redirect examination, Zylstra testified that he finally received this information from the solicitor's office after he relinquished the case to the district office for review (Tr. 282). According to the Agency's Post-Hearing Brief, when Jones provided this information in November, 2002 in response to discovery requests, Investigator Zylstra attempted to contact the employees, but was unable to reach them because the phone numbers provided were no longer in service, or the employees had moved or did not respond to the mailing Investigator Zylstra sent.

[7] Zylstra's narrative report does not reflect direct questions regarding commercial or residential customers (Tr. 201).

fringe benefits to the service workers (Tr. 141). Zylstra further noted that his review of the records did not identify any employees who were exempt from the SCA protections (Tr. 140-41).

On November 8, 2001, Zylstra called Jones and informed him of his findings of violations and the remedies needed to correct these deficiencies (Tr. 143-4). Zylstra's determinations were based on the workers' testimony, as well as a memorandum dated July 3, 2001 signed by Jones and copied to Mr. Fields, a foreman employed by Respondents (Tr. 145, 180, DX 18). The memorandum described a new policy, effective July 5, 2001, of paying employees compensation for 15 minutes of pre- and post-shift activities, and no compensation for travel time either from the yard to the first worksite or from the last worksite back to the yard (Tr. 145, 150, DX 19).[8] The memorandum also stated that, if an employee's equipment were to shut down or break, that employee's time would stop running even though the employee was required to remain at the work site (Tr. 150, DX 18). According to Zylstra, Jones conceded the existence of this memorandum and explained that the new policy was meant to deter inefficient use of time by employees (Tr. 148).

With regard to the rent deductions reflected in Respondents' records, Zylstra concluded that the housing in which H-2B workers lived was furnished primarily for the benefit of the employer and thus could not be credited towards wages paid to workers under the contract. *Ibid.* Zylstra also found that the amount of the monthly rent charged to the H-2B workers ($175 per worker) was unreasonable, since Respondents incurred a cost of only $1,100 a month for the Anacostia house and approximately $850 a month for the Bladensburg house, yet Respondent Jones was recovering well in excess of those amounts based on the rent deductions from the workers' paychecks (Tr. 152). With regard to the condition of the two houses, Zylstra testified that the Anacostia house appeared to be structurally unsound, was sparsely furnished, and did not have enough mattresses to accommodate the number of workers living there (Tr. 154). The Bladensburg house was in much better condition. *Ibid.*

Zylstra further testified that, when he computed Respondents' underpayment of wages, he added the entire one-hour lunch break deducted by Respondents from the time for which the workers were paid (Tr. 157, 226, DX 21). He acknowledged, however, that most workers indicated in their statements that their lunch breaks were usually half an hour (DX 21). Furthermore, Chavez's diary and deposition testimony indicate that his lunch break was usually 30 minutes (DX 13, 13(b)). Zylstra further testified that the payroll records reflected deductions for equipment damage and miscellaneous deductions of $100 per employee (Tr. 153, DX 5, 6). Payroll records also revealed that the workers were not paid for Memorial Day and Labor Day (Tr. 158, DX 5, 6). While Respondents did pay workers for Independence Day, they did so at the deficient wage of $8 per hour and failed to include the required fringe benefits. *Ibid.*

Zylstra indicated that his initial back wage calculations were based on reconstructed hours because all the workers had indicated that not all work time was recorded and paid for (Tr. 157, DX 21). He reconstructed the hours worked by all H-2B workers based primarily on

[8] Zylstra testified that, to the best of his recollection, he obtained this memorandum from CASA of Maryland, Incorporated (Tr.146). After this policy was implemented, a majority of the employee sign-in sheets were changed to allow employees to record a "shop-in" time as well as a "site-in" time, but occasionally the old format of sign in sheet was used (DX 11, 12).

Chavez's diary, which reflected an average workday of nine hours (6 a.m. to 3 p.m.) (Tr. 159, 203, 209, 225, DX 28, 5).[9] However, he later revised his initial calculations at the request of DOL's Solicitor's Office to exclude any amounts for the reconstructed time (Tr. 160-61). His calculations were then reviewed by Bill Blevins, an Investigator for the Agency, who found a number of errors (Tr. 162, 286). Subsequently, all of Respondents' time sheets were finally obtained and an audit was conducted comparing the time sheets with the payroll records (Tr. 162). Zylstra testified that his wage calculations may have included hours for employees who are not service employees[10] and that he mistakenly calculated back wages for Jaime Lara Espinoza for several pay periods he did not actually work (Tr. 209, 273). Zylstra also testified that Jones never made a commitment to make restitution for the back wages owed to the workers (Tr. 158).

On cross-examination, Zylstra acknowledged that he made no attempt at conciliation.[11] The reason for this, according to Zylstra, was because this case involved foreign workers and allegations of a "systemic nature" (Tr. 209). Zylstra also testified that after this case was assigned to him on August 31, 2001, he called Respondents between two and four times prior to the October meeting and left messages without receiving any response (Tr. 163-64, RX 16).[12]

With respect to uncompensated time spent by workers in training, Zylstra testified that he estimated each worker spent eight hours in training based on two sources: the times recited to him by the eight workers he interviewed,[13] and Chavez's diary (Tr. 182, 187-88, 190, 203, DX 28). The workers provided no information to Zylstra regarding the substance of the training, but he believed the training consisted mainly of videos demonstrating the proper use of equipment and safety considerations (Tr. 183-86, 194). He further stated that Chavez and Vasquez testified in depositions taken prior to the formal hearing that the video demonstration took about two hours (DX 13, 15).

When asked to identify the date upon which Respondents stopped performing work under the contract, Zylstra testified that he was not sure. He further testified, however, that, given the seasonal nature of grass cutting, most of the work was probably finished by the "end of November, December" (Tr. 220).

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[9] This nine-hour period included the one-hour lunch break which Respondents had subtracted and which Zylstra added back (Tr. 228). Zylstra testified that he deemed Chavez's diary to be a reliable record of actual work hours for all H-2B workers because it was a thorough day-by-day record and the workers had indicated that they all started and ended work at about the same time (Tr. 197-99). For non-H-2B employees, Zylstra did not rely on Chavez's diary and instead made calculations based solely on the hours reflected on the face of the record (Tr. 200; DX 19).

[10] In particular, Zylstra conceded that he did not ascertain the job descriptions or positions of Ronique Howard, Emmy Frenz, and Ruby Wesby (Tr. 205-09, DX 5 at 1, 11, 26).

[11] He explained that "conciliation . . . in the wage and hour lexicon is one or two phone calls to the employer to try to resolve it . . . without making an official finding of fact" (Tr. 209).

[12] However, Zylstra's work log does not reflect any such phone calls (Tr. 166, 279, RX 14).

[13] Campos testified that he received training along with 20 other workers from 6 a.m. and 1 p.m. on 4/5/01 (Tr. 183, DX 21). Carmona made no reference to training. *Ibid.* Coatzozon stated that on the first day Respondents conducted unpaid training at the main office (Tr. 184, DX 21). Fernandez and Norberto made no mention of training, but referenced Chavez's diary (which does mention training) as an accurate reflection of their hours (Tr. 185, DX 21). Benito Vasquez stated that his first two days of work were training and not paid for. *Ibid.* Finally, Isaac Vasquez's written testimony did not mention training (Tr. 194, DX 29).

On redirect examination, Zylstra testified that, on November 18, 2001, he discussed his findings and conclusions with an attorney named Billy Ponds who represented Jones. He further testified that he later spoke with Jeffrey Jones and John Howard, Jones's trial counsel, but was unable to reach a settlement with respect to Respondents' payment of back wages and fringe benefits owed under the contract on either occasion (Tr. 283-85).

John R. Kelly

John Kelly is an Assistant District Director of DOL's Wage and Hour Division and has worked in that position since 1990 (Tr. 291). Kelly previously worked as an Investigator in the Wage and Hour Division from 1976 to 1990 and has used computers extensively for many years to produce back wage calculations (Tr. 291-2).

Kelly testified that his job as Assistant District Director requires that he review and update computations made by Investigators, and that he conducted such a review of computations made in this investigation (Tr. 295). Kelly explained that he based his back wage computations on Zylstra's narrative report, Respondents' payroll journal and time records, a July 3, 2001 memorandum, checks issued to the workers, and Pedro Chavez's diary[14] (Tr. 293, 295, DX 5, 6, 9-12, 13(b)). Some documents were newly obtained and had not been available to Investigators when they made prior wage and benefits computations (Tr. 296).

Kelly described the methodology he used for calculating the back wages and benefits owed by Respondents for the period from April 6, 2001 through March 23, 2002 and noted that Respondents had changed the way they kept records in July 2001 (Tr. 314).[15] He testified that he used Chavez's diary to calculate the hours worked by Chavez only, and he ascertained the number of days and hours worked by other workers based exclusively on Respondents' time and attendance records (Tr. 298, 302-03, 305-06, DX 13(b)).[16] Kelly used a rate of $9.05 as stipulated in the wage determination, except for those employees whose rates were higher than the required minimum, and to every day worked by an employee he added 30 minutes of pay out of an hour designated by Respondents as an unpaid lunch break (Tr. 310, 314-15, DX 2). Kelly did not reconstruct the meal breaks taken by Chavez because his diary specified his actual breaks (Tr. 316).

In order to compensate workers for the July 2001 change in Respondents' sign-in policy, Kelly multiplied the number of days worked by one hour (Tr. 317-19, DX 18). This one hour was a "rough estimation" of the average amount of time between the "shop in" and "site in" times reflected in the time and attendance records (Tr. 317, DX 11). For Chavez, he again used the actual working time reflected in his diary (Tr. 321).

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[14] He stated that he speaks fluent Spanish, as he had studied it extensively in college and in the Defense Language Institute, and he uses it almost daily in his work (Tr. 306).

[15] He obtained employees' names from Respondents' payroll journal and time and attendance records since some employees were listed only in the attendance records (Tr. 302, DX 9-12).

[16] Kelly subtracted any breaks of 30 minutes or more (because they "qualify as a bona fide meal period"), but counted as time worked any breaks under 30 minutes; breaks of more than 15 minutes but less than half an hour count as breaks (Tr. 317). He also explained that he used the time and attendance report, not the individual time sheets, but spot checked the daily sign-in sheets (Tr. 304).

In calculating unpaid fringe benefits, Kelly used the $1.63 rate specified in the applicable wage determination, applying a cap of 80 hours for biweekly pay periods in order not to exceed the fringe benefit entitlement (Tr. 321, DX 2). He also calculated overtime payments due workers, and he cross-checked all calculations (Tr. 345-49). For holiday pay calculations, Kelly used a standard work day of eight hours (Tr. 345).

Next, Kelly summarized the miscellaneous and equipment damage deductions listed in Respondents' payroll journal (Tr. 343).[17] He testified that he added to the unpaid wages all the miscellaneous deductions reflected in Respondents' payroll journal, but he was unable to ascertain their exact nature (Tr. 360, 363).[18] Kelly also added one-half hour to each day worked to compensate the workers for the one-half hour improperly deducted by Respondents for two fifteen-minute breaks (Tr. 364). For April 6, 2001, he added eight hours and an additional half an hour, which he acknowledged to be a mistake since the entire workday was only 8-hours long (6:00 am to 2:00 pm) (Tr. 364, 366, DX 5). Thus, he conceded that his calculations must be corrected by subtracting half an hour from the total hours of the fifteen workers identified as working that day (Tr. 367-70, DX 24).

Kelly also testified that he obtained interest rates from the Treasury Department's web site, which is a standard method for calculating pretrial interest prescribed by the Agency's "field operations handbook," and computed the pretrial interest due on the wages and fringe benefits which had not been paid by Respondents' to their workers (Tr. 350-51, 375).[19] According to Kelly, this is the same procedure used by the federal courts in determining the applicable prejudgment interest rate and by the Internal Revenue Service to assess prejudgment interest on income tax underpayments (Tr. 375, 358).

Kelly was unable to explain why, according to his spreadsheet, Claudio Baxin was owed considerably more than the other workers (Tr. 374, DX 24). He also acknowledged that he mistakenly credited all the H-2B employees who started work on April 5, 2001 (including Baxin) with $713 (Tr. 376).[20] Kelly was unable to explain this entry or to identify where he obtained this data, nor could he find any entry for Baxin in the payroll journal for the period ending April 6, 2001 (Tr. 375-76, DX 5). He stated that "[t]he .5 should not be there in Column H, and the [$]713 should not be in Column M . . . for that date . . . [t]hroughout the spreadsheet" (Tr. 386). Accordingly, for the pay period ending April 6, 2001, the employer, according to Kelly, actually owed its workers wages for 7.5 hours not included in the spreadsheets (Tr. 386).

Kelly testified that he identified employees who were not covered by the contract by looking at their rates of pay, but that he did not use a specific dollar amount as demonstrating that an employee was covered or excluded under the contract (Tr. 389). Instead, "[i]f a, a name appeared once . . . or twice on the payroll for a large amount of money, [he] did not add them to the spreadsheet." (Tr. 376, 378, DX 5).[21] When asked how he had determined which employees

[17] In calculating deducted amounts, Kelly relied solely on the payroll journal (Tr. 343-45).
[18] He further stated that he did not include "cash advances" and "loan repayments" in his calculations because such payments were effectively cancelled out (Tr. 361, 384, DX 5).
[19] Kelly computed the interest by quarters and took into account any quarterly changes in the interest rates (DX 24).
[20] This amount was credited to the same 15 workers that require correction for April 6, 2001 (see above).
[21] He did include in his calculations those individuals who were getting paid more than a minimum hourly rate of $10.68 (the $9.05 hourly wage plus fringe benefits of $1.63) (Tr. 378).

were salaried and which were administrative employees, Kelly stated that he simply assumed that the workers that were paid higher salary were not service employees (Tr. 378-79). Kelly explained that receiving a salary, by itself, does not make an employee exempt (Tr. 382). He further added that being paid for the days not worked or receiving "comp" time are not sufficient indicators that an employee (*e.g.*, Thomas Fields) is a salaried versus hourly worker (Tr. 380-81, DX 11).[22] Kelly acknowledged that he was unable to determine whether Emmy Frenz or Arinda Johnson received a salary or an hourly rate (Tr. 390-91).[23]

Marva Ray

Marva Ray, who is Jeffrey Jones's sister, testified that she was present at Lawn Restoration's office during Zylstra's visit in October 2001 (Tr. 395-96).[24] According to Ray, she witnessed part of the conversation between Zylstra and Jones which lasted about 20 to 45 minutes (Tr. 396, 398, 399-400). She testified that she saw Jones making copies and organizing sign-in and sign-out sheets into stacks (Tr. 397, 401-02). According to Ray, Zylstra left the office for a few minutes to get coffee at a nearby 7-11 store and when he returned Jones had retrieved the documents Zylstra requested (Tr. 402). Ray testified she heard Jones offer to Zylstra the payroll records he requested plus the sign-in and sign-out sheets (Tr. 397-98). She recalled that Zylstra took only the payroll records and stated that he did not need the time sheets (Tr. 398). When the meeting was over, Jones walked out of the office with Zylstra to show him the way back to "wherever he was staying" (Tr. 403).

Judy Thompson

Thompson testified that Jones hired her in April, 2001 at $75 per day to cook meals for his employees (Tr. 405). She did not know the employees' names but knew that they were "Spanish" and, to her knowledge, had just arrived in the country (Tr. 405). On the first day that she worked for Jones, she prepared meals in the Anacostia house, but after that she cooked at her house because she felt uncomfortable cooking "in front of all th[o]se guys" (Tr. 405, 407). The meals she prepared at her home were delivered to the workers (Tr. 407).

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[22] Kelly explained that the time not worked could have been vacation time (even if the record did not say so) (Tr. 380-81). He also added that, while "comp" time and salary are the two tests generally used for determining whether an employee is exempt (i.e., executive, administrative, or professional), he would also have to look at the duties of a particular worker to determine whether he or she was exempt, and he did not have that information with respect to Respondents' employees (Tr. 382).

[23] He testified that he did not know how to interpret the payroll figures for Emmy Frenz (either a salary of $12,000 or and hourly wage of $12) and Arinda Johnson (either an $8,000 salary or hourly wage of $8) (Tr. 390-91).

[24] Ray testified that she recalled having stopped by her brother's office on the way from a physical therapy appointment and that she believed she had bills that reflected the date and time of her appointment (Tr. 400). Although the record was left open after the formal hearing to allow Respondents to submit copies of any documents which might corroborate Ray's testimony, no documents were ever produced. Instead, Respondents submitted on March 6, 2003 a sworn declaration executed by Ray reflecting that she conducted a thorough search of her records but could not locate any statement verifying she visited her physical therapist's office on the day Zylstra met with her brother at Lawn Restoration's office. The statement further notes that Ray "was mistaken about the date [she] was treated at the therapist's office, [but was] not mistaken about . . . being present when Mr. Zylstra came to the office." Declaration of Marva Ray at ¶ 2.

Thompson testified that she saw the front room, kitchen, and basement of the Anacostia house and found them to be clean, "decent," and freshly painted (Tr. 405-06). On the first day, she cooked dinner, which consisted of fried chicken, rice with gravy, and stir-fried vegetables, for 22 workers (Tr. 406). Three workers arrived late, so Thompson and Jones made hamburgers and gravy for them (Tr. 406).

According to Thompson, she continued to prepare dinners for the workers for about three and a half weeks (Tr. 407). On two occasions, she also prepared breakfast and sandwiches for lunch, which were then delivered to the workers' job site by Larry Thompson (Tr. 407). Jones purchased all the food she prepared (Tr. 407).[25]

Larry Thompson

Larry Thompson testified that in 2001 he was employed as a supervisor by Lawn Restoration and was a salaried employee (Tr. 410, 426). His employment with Lawn Restoration began in March 1999 and continued through the time of this testimony (Tr. 454). He was paid a salary of $12.21 per hour and received "comp" time for overtime work (Tr. 454). He also indicated that his work was seasonal, but testified that he was employed by Lawn Restoration all year round (Tr. 460). Usually three or four workers were assigned to each supervisor (Tr. 456). Thompson stated that he supervised a crew of three people and together with his crew mowed grass in recreation centers using weed eaters, blowers, and edgers (Tr. 410). He did not supervise any residential workers (Tr. 429).

Thompson further testified that he was one of the drivers who picked up 21 H-2B workers on April 4, 2001 at the bus station in Northeast, D.C. when they first arrived in the United States (Tr. 411). Thompson stated he had not expected to find so many workers because his foreman had told him that there would be between 10 and 12 of them (Tr. 412). Once he delivered them to the Anacostia house, they were issued mattresses and uniforms, and then Thomas Fields, the foreman, and Jones talked to them (Tr. 412-13). Thompson testified that the day after the Mexican workers arrived, Jones was looking for a cook, and Thompson suggested to Jones that he use Judy Thompson, his sister (Tr. 414).

The day after the H-2B workers arrived, Thompson picked up five workers from the Anacostia house in a company truck between 9:00 and 9:30 a.m. and took them to the main office (Tr. 414). According to Thompson, once they arrived at the office, he told Manuel Duarte, a Guatemalan worker employed by Lawn Restoration who also acted as a translator, that the workers were free to decide whether or not they wanted to watch a safety and training videotape (Tr. 414). Thompson explained that these tapes were approximately 10 or 15-minutes long and would not benefit H-2B workers who would not be using the complicated equipment depicted in the video (Tr. 415-16, 455).

Thompson further stated that the workers were not required to do any work the first day (Tr. 417). According to Thompson, Jones explained to the workers that they would be issued

[25] On cross-examination, Thompson testified that she was not paid to appear as a witness (Tr. 408). She also stated that Jones paid her in cash and that she never received any type of W-2 form at the end of the year (Tr. 409).

their equipment that day or the day after (Tr. 416). The new workers were allowed to use only weed eaters because they did not have enough experience to operate more complex equipment, such as the walk-behind mowers and "Z-riders" (Tr. 417). Later that day Thompson offered to take the workers home, but they asked him to show them the work sites, which he did after informing Jones over the radio (Tr. 417). At one site, Thompson observed Manuel Duarte's crew and another crew at work (Tr. 455-56). He testified that he delivered the workers to their residence between 12:30 and 1:00 p.m. *Ibid.*

Thompson also testified that the workers began to work on the job sites on Monday, April 9, 2001. *Ibid*. His crew included workers named Williams, Isaac, and Pedro (Tr. 418). He showed nine workers how to get to Lawn Restoration's office by bus, but they chose instead to be picked up by Thompson, Kevin, and Larry Ball (Tr. 419-20). Thompson used a Lawn Restoration truck to pick them up around 6:15 a.m. (Tr. 420).

Thompson stated that either Jones or Fields picked him up in the morning between five and fifteen minutes before six (Tr. 420). Once all the drivers arrived at the office, they would get the trucks and pick up the workers at the Anacostia house (Tr. 421). Without traffic, it took about fifteen minutes to drive from the house in Anacostia to the main office (Tr. 422). Starting with the second week, the arrivals of trucks at the main office were staggered (Tr. 425-26). At the main office, the supervisors loaded the Z-rider and walk-behind mowers on the truck because the new workers were insufficiently experienced to operate the equipment (Tr. 422-23). The new workers were responsible only for loading their weed eaters, which they did not have to do in the morning because the weed eaters and blowers were never unloaded from the trucks at night (Tr. 422-23). Each crew received a list of job sites from Fields (Tr. 423). Thompson stated that it generally took him no more than seven to eight minutes to travel from Lawn Restoration's shop[26] to the first site in D.C. at around 6:30 a.m. (Tr. 457).[27]

With regard to the sign-in procedures employed by Respondents, Thompson explained that at one time the sign-in sheets were made available for everybody to sign, which resulted in delays and the workers signing the names of absent workers (Tr. 424). To avoid this, a new system was implemented whereby each supervisor was responsible for signing his crew in "once the driver supervisor [was] ready [and] the truck [was] loaded with equipment" (Tr. 425).

According to Thompson, under the schedule set up by Fields, he and his crew had small sites for which they were responsible that took about 30 to 35 minutes each to complete (Tr. 426). As a result, the crew completed a whole day's work (six sites) before lunchtime, and finished all two wards to which they were assigned in three days in any given week (Tr. 426-27). Sometimes a crew member who had nothing to do was called to assist another crew (Tr. 427). After all the assigned work was done, the workers spent the remaining time "just sit[ing] around" or riding around, while Thompson periodically called the other supervisors to see if they needed assistance (Tr. 428). Thompson testified that neither Jones nor Fields visited the job sites, and

[26] The following words are used interchangeably to refer to Respondents' warehouse located in Washington, D.C.: "warehouse," "shop," "office," and "yard."

[27] One of the trucks in which the workers were transported had built-in benches with no seat belts, while two other trucks had security straps just like seat belts (Tr. 458-59).

Jones did not know about how little time it took the crews to complete their work (Tr. 426, 428, 431).

Thompson further testified that the workers were not allowed to do work for anyone other than Lawn Restoration during any given workday (Tr. 428). Nevertheless, according to Thompson, after about three weeks, the workers began getting offers from private residents to cut their lawns (Tr. 428). Thompson said that Pedro and Isaac accepted two such offers, and he accepted one such offer himself and negotiated the price for all three (Tr. 428-30). Thompson further testified that Pedro and Isaac requested permission to use a small "21" mower stored on his truck, which belonged to the residential workers whom Thompson occasionally drove around (Tr. 429).

Thompson also testified that during the first week, his crew took lunch from 12:00 Noon to 12:30 p.m., but after that the workers would take a lunch break "[f]rom 11 on up . . . until it's time to go in" (Tr. 430-31). He explained that they had so much free time because they would finish work almost two days ahead of schedule (Tr. 431). He also stated that in 2001 the workers never had to skip a lunch break due to a large amount of work (Tr. 434).

According to Thompson, he and the other workers engaged in unauthorized use of Respondents' credit card entrusted to Thompson solely to purchase gas (Tr. 431). He used the card to buy sodas and other items and, on one occasion, saw Pedro buy two calling cards with the gas card (Tr. 432). About a month later, Jones discovered the excessive charges on the credit card (Tr. 433).

Thompson further stated that his crew usually completed work assignments around 2:30 or 3 p.m. (Tr. 435). Thompson repeatedly testified that the workers did not have to go to the shop after work and were driven straight home from the job site (Tr. 437, 440). He further testified that the supervisors had to take all the workers who lived in Anacostia to a certain meeting point in Northeast D.C., where Jones picked them up and took them home without going back to the shop (Tr. 436).[28] According to Thompson, if Jones was not available, the supervisors took them straight home (Tr. 437). It was Thompson's responsibility to take the workers who lived in the Bladensburg house to that residence (Tr. 437). Thompson testified that the workers cleaned their equipment at the last site, unless the equipment had to be washed at the shop (Tr. 437). He stated that when he returned to the shop after dropping off workers in Bladensburg, there were no other workers there except for the supervisors (Tr. 438). However, on cross-examination, Thompson contradicted his previous testimony by stating that all employees were required to return to the warehouse at the end of the day (Tr. 459).

Thompson described the procedure for signing out at the end of the day as follows:

> [W]hen we met at that one spot, Mr. Fields would . . . point at his watch and I guess he was letting them know what time they would be signed out. So if it's 4 o'clock, he would sign them out at 5 o'clock. So they'll write it down.
> . . . .

[28] On Thompson's crew, Cruz was such a worker. *Ibid.*

Fields [gave] them another hour, which is 5 o'clock.

(Tr. 437-40). He further testified that storing equipment took about five minutes and involved driving the two walk-behind mowers and the Z-rider off the truck and back onto the truck (Tr. 438). According to Thompson, the weed eaters and blowers remained on the truck overnight so he and the other supervisors were ready to go the next morning (Tr. 439).

Officer Timothy McNamara

McNamara is a police officer who supervises the Code Enforcement Division of the Bladensburg Police Department and is responsible for enforcing the housing codes within the town of Bladensburg, Maryland (Tr. 466). On August 16, 2001, he conducted an investigation of Respondents' Bladensburg house after a resident of the property reported in late July that the building was overcrowded (Tr. 467-68). McNamara was unable to obtain a copy of the rental license for the property at the time of his inspection (Tr. 467).

McNamara testified that he inspected the house at 4909 Taylor Street with another Bladensburg police officer, Corporal Cowling, on August 16, 2001 and concluded that it could not reasonably accommodate eight people (Tr. 468-70). He described the house as a "one story, single family home, three bedrooms, one bath, living room, dining room, kitchen and basement" (Tr. 468). The house contained 12 beds (some were located in closets and in the basement), but most mattresses were placed on the floor and one mattress was on a makeshift two-by-four frame (Tr. 469). The building contained no smoke detectors, and the only toilet in the residence was not functional at the time of his inspection (Tr. 469).

McNamara testified that he did not take any action against the owner of the house (such as citing him for code violations) because he was asked by the tenants through an interpreter to "hold off on any action . . . [because] they were in fear that they would be evicted or put out on the street, and that they would be leaving that house within a week of [the] inspection anyway, so we did hold off" (Tr. 470).

On cross-examination, McNamara testified that a house without smoke detectors is not considered life threatening but violates applicable housing codes (Tr. 470). He also testified that he did not know whether there was a pending application for a rental license for the property at the time of the inspection (Tr. 471). McNamara testified that when he returned to the residence a week later at about 4:30 p.m., the workers were gone and the house appeared empty (Tr. 471).

According to McNamara, prior to issuing a rental license, County authorities conduct an investigation of the house for which the license is requested to determine whether the plumbing is working, whether smoke detectors are installed, and how many people may safely reside in the residence (Tr. 472). He observed eight people living in the house at the time of his inspection and testified that he was contacted a few days later by a representative of the Mexican Embassy

and an attorney from CASA of Maryland[29] and asked to hold off any enforcement action (Tr. 473).

Mary Elizabeth Hulbert

Hulbert testified that she is a manager at Kohler Equipment ("Kohler") where she has worked for 23 years (Tr. 475). Her company sells gas powered equipment used in the landscaping industry. *Ibid.* She testified that she knows Jeffrey Jones and that Kohler has been selling equipment to Lawn Restoration and servicing such equipment for approximately 10 years[30] (Tr. 476, 478). She further stated that "a couple of years ago, Lawn Restoration became . . . such an abusive company that my mechanics nicknamed them the destructive crew" (Tr. 478). According to Hulbert, they continuously brought in equipment with damage reflecting extreme and "blatant abuse" (*e.g.*, equipment had run over curbs at top speed, engines were operated without oil, etc.) resulting in very costly repairs (Tr. 478-79). Hulbert testified that she also observed Lawn Restoration workers operate equipment with extreme carelessness[31] (Tr. 480).

According to 30 invoices for the 2001 season reviewed by Hulbert (dating from March 2001 through September 2001), Respondents' cost of repairs during that year was approximately $15,000 (Tr. 482, RX 63, 68, DX 27). Hulbert testified that none of the invoices were for damage to weed eaters or to blowers (Tr. 495, RX 27). When asked whether repairs for Lawn Restoration tended to be seasonal, Hulbert stated that they were and stated that, after the grass cutting season, she did not receive similar complaints of damage to the equipment (Tr. 494). Hulbert testified that Respondents had one employee, Mike, who repaired equipment (Tr. 495).

Ventura Duarte

Ventura Duarte testified that he worked for Lawn Restoration in 2001 as a group supervisor and personally operated lawn equipment but did not drive a truck (Tr. 502, 504, 505). In 2001, his group worked on cutting grass in the parks of D.C. (Tr. 505).[32]

Duarte testified that he used trucks to commute to work but later testified that he relied on public transportation to commute to work (Tr. 506). He stated that Lawn Restoration never refused to pay him for the hours that he recorded on his time sheet and said he had no disagreements with Respondents regarding his pay (Tr. 508, 511). Duarte could not recall whether there was enough work to occupy him throughout a workday during the months of April, May, and June, but stated that the amount of work "wasn't that heavy" (Tr. 508-11).

According to Duarte, some members of his crew were from Mexico, and each employee entered his own starting and ending times on the sign-in sheets (Tr. 507, 509). Duarte testified

[29] CASA of Maryland is a community organization that serves the needs of Latin American and other immigrants in the United States. In particular, it offers legal services in the area of employment rights. *See* http://www.casademaryland.org/.

[30] Specifically, Kohler sold to Respondents: 72-inch riding mowers; Scag (ph.) walk-behind mowers (36-inch, 48-inch- 52-inch); commercial push mowers; 21-inch mowers; backpack blowers; line trimmers; stick edgers; wheel edgers; weed eaters; chain saws; and a 12-foot bat-wing mower (Tr. 477).

[31] For example, unloading a "$5,000 machine" by letting it "jump off the back of a truck" (Tr. 480).

[32] His group varied in size from time to time (Tr. 505).

that the Mexican workers used only hand-held machines because they did not know how to use the walk-behind equipment (Tr. 510). He testified that some non-Mexican employees worked in his group in the D.C. parks, but he could not remember their names (Tr. 513). Duarte continued to work for Lawn Restoration in 2001 after the grass cutting season ended (Tr. 512).

On cross-examination, Duarte testified that he used a walk-behind mower in the D.C. parks (Tr. 513). He further testified that he was no longer employed by Respondents, that he has lived in the United States for 12 years, and he holds a valid work permit (Tr. 513).

Manuel Duarte

Manuel Duarte testified that he had worked for Lawn Restoration in 2001, cutting grass in groups of three or four (Tr. 516). He used Metro and a bus to commute to work, and signed his own in and out time sheets (Tr. 517). His responsibilities included driving a "48 machine and a 52" and loading "[a] tractor 62 and 48 machine" on Respondents' trucks in the morning which took him about five to ten minutes to do (Tr. 517, 519-20). He stated that he did not drive a truck (Tr. 521).

Duarte testified that some members of his group were from Mexico and they operated blowers and hand-held machines used around fences (Tr. 517-18). He testified that in 2001, he occasionally kept a personal record of his work hours and was always paid for the time he recorded (Tr. 519). He stated that he took a break around 9:15 for 15 minutes and a lunch break of 30 minutes later in the day (Tr. 520). He described the amount of work he performed on any given day in 2001 as "normal" (Tr. 520-21).

Duarte explained that Fields or Jorge typically gave him a ride from the Lawn Restoration office to his assigned job site (Tr. 521). He testified that he signed in when he arrived at the office, not when he reached the job site. *Ibid.* According to Duarte, he signed out when he reached the office at the end of the workday but not "[u]ntil everything was at the warehouse, the trucks, and the cars" (Tr. 521).

On cross-examination, Duarte testified that he cut grass in the D.C. parks and also loaded equipment onto the trucks (Tr. 522). He further testified that about half the time, the Mexican workers loaded their equipment onto the trucks, and on other occasions they stayed inside the truck (Tr. 522). He did not always see the Mexican workers at the shop in the morning because he did not always arrive there at the same time they did (Tr. 523). He indicated that some African-American workers of Respondents who lived in the United States also worked in the D.C. parks (Tr. 522).

Jeffrey Jones

Jeffrey Jones graduated from Dunbar High School in the District of Columbia, is married, has two children, and has been the sole owner and President of Lawn Restoration for about eight years (Tr. 527-28). He testified that, with regard to Respondents' entry into the original service contract with the D.C. government, he personally completed the application for the subject

contract without legal assistance and was given no instructions regarding his obligations under the contract by the Contracting Officer at the time the contract was awarded (Tr. 704-05).

Jones acknowledged that his copy of the 2001 contract contained wage determination No. 94-2103 setting forth an employee classification for "laborer, grounds maintenance," with a corresponding wage of $9.05 per hour, health and welfare benefit of $1.63 per hour, and a list of holidays that must be compensated (Tr. 770-71, DX 3). He further acknowledged that the contract also stated that employees may not be required to purchase uniforms if such cost would reduce their rate below the required minimum (Tr. 771-72, DX 3). Jones testified, however, that he did not read the contract in its entirety at the time it was awarded, and that he first read the part of the contract pertaining to wages and benefits after Zylstra contacted him (Tr. 772, 875).

Prior to the arrival of the H-2B workers, Jones had 15 to 18 ground maintenance workers which was a sufficient number to perform most of the work on the D.C. contract (Tr. 535-36). Jones stated that, prior to obtaining this contract, his company performed only residential work (Tr. 536). Once Jones obtained the D.C. contract, he applied for H-2B workers through a company named "Amigos," with which he had prior dealings in 2000 (Tr. 536). He initially requested 22 workers, but testified that he changed his request to a lower number at the end of March because he was unable to secure sufficient housing for the workers (Tr. 537).

Jones further testified that on April 4, 2001, 21 H-2B workers arrived in Washington and were picked up at the bus station by Jones, Larry Thompson, and Fields, who drove them to the Anacostia house (Tr. 542-43). According to Jones, with the exception of two workers, the H-2B employees did not begin working until the following Monday (Tr. 551-52). He testified that on Thursday, April 5, the workers reported to the office for "processing" between 8:30 and 9:00 a.m. (Tr. 549). The workers filled out employment applications, I-9 forms, and tax forms, and were issued uniforms (Tr. 545-46, 548). According to Jones, processing took approximately one and one-half to two and one-half hours, and the workers were ready to leave around 11:00 or 11:30 a.m., at which time they "should have been" transported to the Anacostia house by Larry Thompson and other drivers (Tr. 550-51). Jones testified that he did not conduct any training that day, nor did he direct any of his employees to do so (Tr. 546). He added that Lawn Restoration had a seven- to ten-minute long video in Spanish on weed eaters, but he did not know whether the H-2B workers watched it that day (Tr. 546-47, RX 26). He further testified that, contrary to Chavez's deposition testimony, Respondents do not have any safety videos that are two hours long (Tr. 580). Jones stated that the H-2B workers received on-the-job training and were paid for it (Tr. 725-26). He also stated that only a few of his employees received training at Kohler on the proper use of the 36-inch Scag walk behinds and Z-riders used on commercial properties (Tr. 531-35).

According to Jones, the hours recorded in Respondents' records for Friday, April 6 were not compensated because the H-2B workers did no work that day and were only issued equipment (Tr. 821-22, 845, RX 42, DX 5). Of the H-2B workers, only Bertin Morales Herrera and Jose Manuel Sanchez Gutierrez were assigned to work on April 6 because they had indicated they knew how to use the weed eaters. *Ibid.*

Jones testified that he encountered disciplinary problems in the course of working with the H-2B workers (Tr. 554). In particular, according to Jones, some of them abused alcohol, acted in a disorderly fashion, and punched holes in the wall in the Anacostia house prompting Mark Calligan to complain to Jones (Tr. 554-55). He stated that they also ignored his instructions to take a lunch break at a standard time from 12:00 Noon to 12:30 p.m. (Tr. 555).[33] On June 11, 2001, Jones imposed a three-day suspension on ten workers who refused to board the truck in the morning until their complaints about unpaid hours were resolved (Tr. 562).[34] Jones further testified that he asked the workers to give him a few days to look into their complaint, but they refused to do so (Tr. 563). Following the suspension, Jones accommodated their requests for extra work time to make up for the missed days (Tr. 564).

He further testified that the only non-H-2B employees that worked on the subject contract were African-American and Guatemalan supervisors (Tr. 726-27). All the other non-H-2B workers, according to Jones, worked exclusively on residential projects and were never assigned to work on the D.C. service contract (Tr. 727-28). Similarly, he testified that, as long as Respondents were receiving funds from the D.C. government for the service contract, the H-2B workers did not perform any residential work (Tr. 728). *Ibid.* He stated that the only time H-2B workers were assigned to do residential work was "at the end of the [government] contract." *Ibid.* At that time, according to Jones, the H-2B workers were assigned to remove two trees on a residential property at "14th and East Capital." *Ibid.*

Jones further acknowledged that Respondents' time and attendance records did not differentiate in any way between residential and contract work performed by employees, such as by identifying the workers or hours devoted to each type of work (Tr. 777-79). He testified that he spent only fifty percent of his time at the warehouse, played no role in assigning workers to different crews, was not always present at the warehouse when supervisors made such assignments, and did not know if any particular employee stayed with the same crew every day (Tr. 779). Jones also testified that the only document reflecting residential work performed by Respondents was a "residential sheet of properties,"[35] and that he could not present any invoices for such work (Tr. 780, 880). According to Jones, Respondents had approximately 53 employees in 2001, a total of four or five residential crews, and six to eight crews working on the subject contract (Tr. 878). Jones also stated that, although he played no role in assigning employees to particular crews, he was involved in deciding which employees performed residential work and which performed work under the D.C. contract (Tr. 878). Jones stated that in 2002, he had about

[33] In April, 2001, Jones issued a three day suspension to several employees (Jorge Luis Cruz Norberto, Pedro Hernandez, Reboltada Hernandez, and Jaime Espinoza) for taking a lunch break at about 1:30 instead of the required time of 12:00 Noon., followed by a 15 minute afternoon break, which, according to Jones, resulted in an additional expense of calling in another crew (Tr. 557-559, RX 35). Only one worker accepted suspension, while two others quit (Tr. 561, RX 37).

[34] Pedro Chavez, Rosando Gutierrez, Rosalino Toga, Jose Gutierrez, Isaac Vasquez, Bertin Herrera, Gaudencio Baxin, Luis Aguilera, Manuel Mendoza, and Ibraham Zola. *Ibid.*

[35] Jones testified that this document divided residential workers into groups A through G, most consisting of two workers (Tr. 780, 879-80). A "Revised Document Production Response" forwarded to a DOL attorney by Jones' trial counsel on December 24, 2002 includes a typed document captioned "2001 Residential Cut List" which reflects various D.C. addresses grouped by "Team A" through "Team G" (RX 76 at 1169-70). The list does not identify the numbers or names of employees assigned to each "Team," but Jones testified the number of workers varied "between two and four guys" (Tr. 880). Jones did not describe during his testimony when, by whom, or for what purpose the document was created.

25-30 residential clients, a decrease of between seven and ten from what he had in 2001 (Tr. 529-30).

According to Jones, Respondents began working on the subject contract in April 2001 (Tr. 535). Jones testified that during the summer of 2001, Respondents' business increasingly slowed down due to a decrease in grass growth caused by a combination of the heat in July, a drought,[36] and the lack of a sprinkler system on the D.C. properties (Tr. 570-72). Jones stated that in June 2001, Darnell Thompson, the Chief of Facilities Maintenance for D.C. Parks and Recreation, informed Jones that he was "reducing [the number of] cuts . . . by about five or six" (Tr. 570-71). Jones explained that during the years with a normal amount of precipitation, Respondents continued to cut grass until October or November (Tr. 570).[37] However, according to Jones, by reducing the number of cuts, Thompson shortened the season for Lawn Restoration and "took away any chance of cutting in November [or] October" (Tr. 571-72). He further testified that by July 2001, the heavy duty equipment could no longer be used because the grass was very dry (Tr. 571).[38] Accordingly, the workers were using only walk-behind mowers and weed eaters, and no longer had to load the other equipment on the trucks every morning or wash down equipment at the end of the day (Tr. 572-73). Jones testified that he was forced to lay off almost fifty percent of his workers (about 10) effective July 29, 2001, and the remaining five or six H-2B workers on October 22, 2001, although one H-2B worker, Rosando Gutierrez, continued to work until November (Tr. 568-9, 571, RX 39, 40).

Jones testified that on September 13, 2001, he was informed by the D.C. officials that the government was ending the funding of his contract (Tr. 576, RX 63). According to Jones, after the government's funding ceased, Lawn Restoration no longer worked for the D.C. government, and the remaining H-2B workers performed only residential work (Tr. 576-77, 579).[39] He further testified that Respondents' records showed the last day of work performed on the subject contract was September 13, 2001, as evidenced by the last invoice submitted to the D.C. government (Tr. 876, RX 63). However, Jones acknowledged that Respondents "could have submitted one or two or more [invoices] after . . . the 9/13 invoice date . . . . We probably were still cutting . . . So until we finished our cycle, I wouldn't send an invoice in" (Tr. 772-73). He further acknowledged that Respondents submitted an invoice dated September 21, 2001 to the D.C. government (Tr. 773-774, DX 31).[40] After being shown this invoice, Jones concluded that Respondents stopped working on the subject contract around the second or third week of September, but testified he could not remember when they submitted the last invoice to the D.C. government (Tr. 774).

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[36] According to Jones, there was an official "water alert" in the DC area in 2001 (Tr. 570).

[37] In fact, the subject contract for 2001 contains the following "anticipated schedule" of grass cutting: April - 2 cuts, May - 3 cuts, June - 3 cuts, July - 3 cuts, August through October - 2 cuts per month (DX 1).

[38] Jones explained that walk-behind mowers and Z-riders were transported in a landscape trailer that was hitched to the truck (Tr. 642, RX 60). After May, however, Respondents used only one or two of those (Tr. 643).

[39] Jones testified that the workers cut down and disposed of two trees at 1407 East Capitol Street (Tr. 576, DX 13). According to Jones, this project could have been completed in a short time, but he instructed Fields to "stretch[…] time" to at least a week "for the guys to get some . . . money" (Tr. 579).

[40] Jones acknowledged that Respondents' payroll journal accurately reflected the names and pay rates of Respondents' employees for the pay period ending 9/22/01 and throughout the remainder of the record (up to the pay period ending 3/30/02) (Tr. 816-820, DX 6).

The subject contract was extended for the 2002 option year, and Respondents continued to work in D.C. parks from April 2002 to September 2002 (Tr. 873, DX 40). The contract for the 2002-2003 option year had a term of March 15, 2002 through March 14, 2003 and provided that the contractor had to maintain the following anticipated schedules of grass cutting: April - 4 cuts, May - 4 cuts, June - 5 cuts, July - 5 cuts, August through October - 4 cuts per month (DX 40). According to Jones, the D.C. government did not start payment on the supplemental contract for the option year 2002 until mid-April, 2002 (Tr. 747-48). Jones testified that in 2002, his employees were allowed to take only one thirty-minute break for lunch (Tr. 900).

With regard to the housing provided by Respondents to the H-2B workers, Jones testified that Mark Calligan, a real estate agent, was unable to find three five-bedroom homes he requested and, instead, obtained only two homes: one in Anacostia and another in Capitol Heights, Maryland (Tr. 537).[41] According to Jones, he later had to withdraw the contract for the Capitol Heights house because its basement was flooded due to three days of rain in March (Tr. 537-38). Instead, he found a house in Bladensburg and entered into a contract for that house on March 28 or 29 (Tr. 538). He testified that he then contacted Amigos to reduce his request to 10 or 12 workers and this adjustment was approved by Amigo's employee Anita Cruz (Tr. 538).

Jones further testified that when the 21 H-2B workers arrived from Mexico on April 4, 2001, they were all taken to the Anacostia house (Tr. 542-43). Jones stated that he and Fields told the workers, using Fernando Roman as an interpreter, that they could not all stay in that house because it would overcrowded (Tr. 543-44). He testified that he offered to move them temporarily into a hotel "or something of that nature," but explained that it would be more expensive for them if he did (Tr. 544). Jones testified that all the workers agreed to stay in the house on High Street and did not want to go back to Mexico (Tr. 544). Jones stated that he then gave money to Fields, who used it to purchase food for the workers at McDonald's (Tr. 545). Jones described the Anacostia house as being "in pretty good shape" (Tr. 539). He further testified that "[i]t . . . has four bedrooms upstairs, a large front room, a large dining room, back porch closed in, kitchen, the basement [with a bedroom]," and two bathrooms. *Ibid.*

On May 5, 2001, according to Jones, he moved nine H-2B workers to the Bladensburg house which had been previously inspected by HUD (Tr. 540, 553). Jones further testified that the nine H-2B workers lived in that house during August 2001 (Tr. 828-29, 864, DX 5).[42] He described the house on Taylor Street as having a large front room and dining room, five bedrooms, a kitchen, and one bathroom (Tr. 540-42, RX 61).

Jones testified that there were about eight H-2B workers remaining in the Anacostia house after the other workers were moved to the Bladensburg house in May 2001, and he stated that several of the H-2B workers had voluntarily left his employ by that time (Tr. 553). According to Jones, Fernando Roman asked at one point whether he could move into a house of his own, to which Jones had no objections, but Jones told him that no transportation would be

[41] Jones also stated that he had an agreement with Jerry Hudley to rent Hudley's apartments for the H-2B workers, but Hudley never provided such housing (Tr. 698).

[42] Jones identified the nine H-2B workers as Pedro Chavez, Alberto Campos Aguilera, Rosando Gutierrez, Juan Morteo, Isaac Vasquez, Claudio Veraletta, Benito Vasquez, Manuel Mendoza. *Ibid.* Jones acknowledged that this list is partially inconsistent with his deposition statement with respect to two workers (Tr. 866, DX 32).

provided if he did (Tr. 700-01). Jones believed Roman and the other H-2B workers decided not to move from the Anacostia and Bladensburg houses because they enjoyed free daily transportation to and from work and because the rent elsewhere would have been higher (Tr. 701).

Jones disagreed with Officer McNamara's testimony that the house appeared empty in late August, stating that six or seven workers were still living in the Bladensburg house in August, and they continued to live there until late October 2001 (Tr. 672). He also testified that he applied for a rental housing license in May 2001, and obtained it in November (Tr. 674, DX 25 at 0886).[43] According to Jones, when he rented the house on Taylor Street to the workers in May 2001, it had working smoke detectors and plumbing and did not need any repairs (Tr. 675). Jones also stated that when the workers notified him about the toilet being broken, he gave money to Larry Thomson who repaired it the next day (Tr. 675-76). No other complaints regarding the house were made, according to Jones, and he believed that the workers were very pleased with their accommodations (Tr. 676).

Jones testified that he purchased the Bladensburg house in order to provide housing to the H-2B workers (Tr. 699). He confirmed the Agency's estimate of the mortgage on the Bladensburg house (approximately $750 a month), but added that Respondents paid a total of $1,394.95 for the utilities[44] and $1,625.88 in property taxes (Tr. 677-84, 696, RX 71, 56).

Jones further testified that, for the Anacostia house, Respondents paid $1,100 a month in rent, $1,100.92 total for utilities, and $500 for a security deposit that was forfeited (Tr. 684-93, RX 30, RX 31). Jones identified a photograph allegedly showing damage to the house caused by the H-2B workers (RX 61).[45] He also testified that he "closed the Anacostia house down" in July 2001 at which time he discovered "we were missing a lot of stuff" (Tr. 640).

With regard to wages paid to employees, Jones testified that he never intentionally underpaid his workers in 2001 (Tr. 764-65). He added that he never received complaints from the Mexican Embassy, CASA of Maryland, or the Agency until after the contract had ended, which made it impossible for him to correct the violations (Tr. 763). Jones testified that he set the hourly wage for his H-2B employees in 2001 based on an advertisement in the Washington Post and a conversation he had with Bill Winfield, President of Amigos (Tr. 703-04, RX 24). According to Jones:

> I had read in the Washington Post a -- an ad for other H-2B employees to come to the Washington area for $7.24. So I spoke to Bob Winfield and I asked, why am I paying 9.05 and others are paying 7.24? He in turn said a reasonable rate is 7.24 in your area. I wouldn't pay these guys $7.24. I would pay them around $8. So that's where I got that $8 from.

[43] He added that Prince George's County never inspected the house (Tr. 675).
[44] This figure includes water charges for the period from May 16, 2001 through January 3, 2002 and electric charges for the period from May 15, 2001 through November 12, 2001 (RX 71). DOL's estimate was $100/month (Tr. 677, RX 11).
[45] The picture shows a thermostat that was allegedly carelessly removed from its proper location by the workers (Tr. 695, RX 61)

Ibid.[46] He also testified that he first learned the minimum wage for 2001 was $9.05 per hour when Ron Zylstra visited his office, and stated that the Chief of the Facilities Maintenance Office for the D.C. Parks and Recreation Department was aware when the contract had been awarded that he was paying his workers $8.00 an hour and never objected to it (Tr. 706).[47] Jones further testified that he was in compliance with the terms of a 2002 service contract with the D.C. government and was paying his workers a minimum wage of $10.19, $2.02 in health and welfare benefits, overtime, and holiday pay (Tr. 708).

With respect to overtime compensation, Jones testified that his employees were paid for overtime at a higher rate only if they worked more than 80 hours in two weeks (Tr. 805).[48] He further testified that he believed Paychex automatically paid his employees holiday pay, but never verified that this was done (Tr. 789).

Jones's testimony then turned to the July 3, 2001 memorandum which informed Respondents' workers that, beginning July 5, 2001, they were required to sign in dailyat 6:00 a.m. at which time the clock would run for only 15 minutes (until 6:15 a.m.) while equipment was loaded on the trucks and would not resume running until the crews actually reached their assigned work sites (DX 18). Jones testified that he neither drafted nor signed the memorandum, and stated thathe never directed any of his staff to prepare or circulate the memorandum on his behalf (Tr. 582-83). In fact, according to Jones, he never saw it before the complaint was filed by DOL in this case (Tr. 584).[49] Jones further stated that the format of the memorandum is inconsistent with the format he used for company memoranda (Tr. 582-84, DX 18).[50] Jones acknowledged, however, that Zylstra discussed the July 3, 2001 memorandum with him over the phone in November, but stated that he never showed it to him (Tr. 584). He further acknowledged that while DOL's search of his computers in January 2003 did not uncover the July 3, 2001 memorandum, he had a practice at the start of a new year of deleting documents from the prior year from his computer (Tr. 869).

Jones denied that time and attendance records for July 2001 reflected a change in Respondents' sign-in policy as alleged by the Agency (Tr. 759, RX 50). However, a change is clearly apparent on the sign-in sheets dated from July 18, 2001 forward in that they contain two columns ("shop in" and "site in") which were not reflected on earlier sign-in sheets (RX 50). Jones testified that he did not know what these two columns represented because Thomas Fields, his foreman, changed the sign in sheets while Jones was on vacation and later told him that the

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[46] Jones added that in a letter dated September 26, 2001, Anita Cruz of Amigos stated that the minimum wage for the upcoming 2002 season was $7.24 (Tr. 706-07). The letter from Cruz actually stated that the prevailing wage in the area was being reduced "from $9.05 [for 2001] to $7.24 [for 2002]" (RX 24).

[47] Jones did not state when his conversation with Winfield occurred and gave no explanation regarding where or how he came up with the figure of $9.05 during their conversation in light of the fact that he purportedly did not learn that the minimum contract wage was $9.05 per hour until Ron Zylstra visited his office in October 2001.

[48] Thus, an employee who worked 45 hours in week one of the pay period and 30 hours in week two, would not receive overtime pay. *Ibid.*

[49] Although it does not contain Jones' signature, the text of the memorandum is followed by a typed name and title, i.e., "J. Jones LRS Pres" (DX 18).

[50] According to Jones, the memorandum stated "memo" in block letters and did not contain his signature or the company's letterhead, while his memoranda were always typed, signed, and contained a letterhead with Lawn Restoration's name, address, and phone number. *Ibid.*

workers had requested this change (Tr. 760). However, Jones subsequently testified that the "site in" time indicated when the workers were scheduled by the supervisors to report to work (the times were staggered), while the "shop in" time was used for workers who arrived at the shop on the 6:00 a.m. truck from their homes even though they were not scheduled to start work until later (Tr. 760-62, 862-63). He confirmed that Respondents' workers were not paid for the time between the "shop in" time and the "site in" time noted in the company's time sheets (Tr. 862, RX 50).

With regard to various deductions made from employees' paychecks, Jones testified that all the workers agreed to the terms of the loan repayment and rental deductions made from their paychecks, and also agreed to Respondents' housing and transportation arrangements (Tr. 626-35). Jones testified thathe authorized deductions of $100 made from paychecks of the employees laid off in July 2001 after they refused to produce Social Security numbers, since Respondents could, according to Jones, be fined $50 by the Internal Revenue Service and $25 by Paychex[51] for every employee whose Social Security number was not provided (Tr. 619, 622, RX 28, 29).[52] He was unable to explain with certainty several deductions reflected in the records under the miscellaneous column[53] (Tr. 846-47, 853-55, DX 5). Jones deducted amounts from employees' paychecks for equipment damage, although he acknowledged that equipment damage constituted an expense that significantly reduced his profit for tax purposes (Tr. 614-19, 856-8, RX 27).[54]

With respect to breaks, Jones testified that workers were supposed to take one lunch break from 12:00 Noon to 12:30 p.m. and two additional breaks; a morning break from 10:00 to 10:15 a.m., and an afternoon break from 2:00 to 2:15 p.m. He testified, however, that workers had the option of combining the morning and afternoon breaks with their lunch break (Tr. 593). Jones acknowledged that it was Lawn Restoration's policy in 2001 to deduct one hour per day for a one-half hour lunch break and two separate 15 minute breaks (Tr. 856-8).

Jones testified that the only time Chavez complained to him about uncompensated and unrecorded work hours was on June 11, 2001 (Tr. 668-69, 671). Jones stated that he investigated the complaint and subsequently adjusted Chavez's time and attendance records (Tr. 669). To compensate the workers who complained on June 11, 2001 about the unpaid hours, Jones wrote them checks from Lawn Restoration's general account (Tr. 670-71, RX 41).

Jones testified that Lawn Restoration provided its employee with free uniforms consisting of shirts, T-shirts, pants, gloves, safety goggles, and earplugs (Tr. 546, 548, RX 58). He

[51] Paychex is a private firm retained by Respondents' to handle the company's payroll function.
[52] Jones testified he believed that all H-2B workers had Social Security numbers because he filled out their applications and had Larry Thompson drive them to the Social Security Administration so they could be filed (Tr. 620-21).
[53] Jones thought a $99 miscellaneous deduction with respect to Berganza might be related to a cell phone, and testified that two other miscellaneous deductions (one for $250 and another for $150 for Kevin Jones and Larry Thompson respectively) were probably for equipment damage. Jones further testified that miscellaneous deductions of $275 and $175 noted in the payroll records improperly "recaptured" rent deductions and loan repayments mistakenly credited to the workers by Ms. Benham, his Office Manager (Tr. 758, DX 5).
[54] He noted the names of the individuals responsible for the damage on Kohler's invoices, and then deducted "half, no labor cost, just a percentage," rather than the full amount. *Ibid.*

explained that even though many more H-2B workers arrived from Mexico than he had anticipated, he had enough uniforms for all 23 workers because he purchased them when he was expecting to employ that many workers (Tr. 803). According to Jones, because several of the H-2B workers did not have adequate shoes when they arrived in Washington, Lawn Restoration provided the majority of them with boots at no charge (Tr. 548). Jones also testified that, in addition to uniforms, his sisters purchased pants, shirts and jackets for the H-2B workers, in part with their own money (Tr. 635-36). Jones testified that, because many of the workers had limited funds, Respondents also advanced $50 and $100 in cash to all but two workers on the day they were processed (Tr. 552). He stated that the Anacostia house was furnished entirely by Lawn Restoration, and that Respondents purchased 18 beds with mattresses (in addition to the 4 or 5 beds acquired previously), half a dozen tables, four or five "sleep queen sofas," curtains, 36 chairs, and a dozen fans (the house was not air conditioned) (Tr. 636-38, RX 62).[55] Jones testified that Respondents also purchased bedding and toiletries for every worker (Tr. 637).

Jones next described various expenses incurred by Respondents relating to the Bladensburg house and the Anacostia house, including the installation of new locks ($470.50), circuit breakers, smoke detectors, and fire extinguishers ($600), the purchase of a new refrigerator and stove[56] ($2,220.29) and wall rails ($950), and the cost of painting ($435.77) (Tr. 709-15, RX 33).[57] He also enumerated expenses incurred to provide food, cookware, bedding, clothing, and cleaning supplies for the H-2B workers, which he calculated at $833.45 (Tr. 715-21, RX 34).[58] Jones testified that Respondents also spent $7,995.90 on furniture for the houses, but acknowledged that he did not have any receipts to support those purchases (Tr. 722, 832, RX 34).

Jones testified that the H-2B workers were transported by Respondents to and from work every day throughout the entire 2001 season, even though he initially planned to offer only two weeks of free transportation (Tr. 564-67). He testified that every day Respondents sent at least four trucks to pick up the H-2B workers, and that some drivers were given "comp" time for the trip from the warehouse to the workers' homes (Tr. 700). He further stated that a round-trip by bus to the warehouse from the Bladensburg house costs $2.50, a round-trip from the Anacostia house to the warehouse cost $2.65, and both trips took about 20 minutes (Tr. 567-68). According to Jones, non-H-2B workers, with the exception of Larry Thompson, did not get free transportation (Tr. 701). He testified that the workers were not required to report to the warehouse either before or after work, and were free to use public transportation to go directly to their first work sites in the morning and straight to their homes after work in the afternoon (Tr. 566). According to Jones, the only reason they passed through the warehouse before and after work was to get a free ride home from Respondents (Tr. 567).[59]

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[55] Jones stated that he and Fields helped workers assemble the beds, but the workers apparently chose to put the mattresses on the floor (Tr. 638-39). He added that the photograph of Benito Vasquez having a meal while sitting on his mattress on the floor was misleading because the Anacostia house had two 6 or 8-foot tables on the back porch (Tr. 699-700, DX 15C).

[56] The receipt for these items is dated September 24, 2001 (RX 33).

[57] Respondents presented receipts and checks for all amounts, except for the $950 repairs (Tr. 834, RX 33).

[58] In addition, Jones stated that Respondents paid $75.04 for water and toilet paper for all employees (Tr. 722).

[59] Jones stated that only during the first two weeks the workers had additional reasons to report to the warehouse, i.e., to familiarize themselves with the supervisors and also the location of the work sites (Tr. 567).

Jones testified that his first contact with Ron Zylstra was in September 2001 when he received a letter requesting payroll and time records for the last pay period and asking him to fill out a business data form (Tr. 587, RX 8). Jones stated that he submitted time records and the completed form,[60] and later made available to Zylstra all the documents requested during an October 28, 2001 meeting (Tr. 588-89, 594, RX 9, 26).[61] According to Jones, Zylstra never discussed with him at that meeting anything about employer's rights or "coming into compliance" (Tr. 595).

Jones testified that Zylstra was interested only in Respondents' payroll journal, and Jones volunteered to make copies for him (Tr. 597). He further testified that Zylstra showed no interest in the other documents he had prepared, which led Jones to believe that he had already prejudged the case and was not being thorough or objective (Tr. 598-00). In particular, Jones felt that Zylstra should have inquired about the non-H-2B employees (Tr. 602). When Zylstra was leaving, Jones drove with him for some time to show him the way back to his hotel (Tr. 601). Jones testified that he had never been investigated by the Department of Labor's Wage and Hour Division prior to this case (Tr. 601).

According to Jones, approximately one month after the October meeting, Zylstra called to inform him that his investigation uncovered several violations. Jones stated that Zylstra determined the total amount of unpaid wages and fringe benefits due from Respondents to its employees was $107,000 and he asked whether Jones intended to pay this amount (Tr. 603-04). Jones testified that he disputed the amount and asked why calculations were made without first obtaining the relevant documentation from Jones (Tr. 604). He also stated that he asked Zylstra to postpone any action against him so that he could perform a self-audit, which Zylstra agreed to do (Tr. 604).

Jones testified that he was subsequently informed that contract funds had been withheld by DOL (Tr. 605, RX 17).[62] Thereafter, Zylstra called Jones to inquire about the findings of Jones's self-audit, and Jones responded that the amount he came up with was significantly lower (Tr. 605). When Zylstra informed Jones that one of his employees kept a diary, Jones objected that it was not a reliable indication of the hours worked by more than forty other people (Tr. 606). When asked whether Jones intended to make payment on the wage and benefits underpayments, Jones referred Zylstra to Billy Ponds, his attorney at the time (Tr. 606). Subsequently, Ponds sent a letter to the Agency dated November 26, 2001 indicating Jones's objections to DOL's calculations and his willingness to settle the matter, but, according to Jones, the Agency never responded to Ponds' letter (Tr. 606-07, RX 18). Jones testified that during a

[60] Jones acknowledged that he indicated on the business form he had 10 employees, allowed 30 minutes for lunch breaks, and did not give any answer to the question that asked about his method of time keeping (Tr. 591-92, DX 26).

[61] Jones testified that he provided a list of names, addresses, Social Security numbers, and telephone numbers of the nine employees, incorrectly described by Jones as "H-2B employees," to Ron Zylstra around November 2001 and to Ms. Beason on April 12, 2002 (Tr. 723, RX 13). The employees named on the list are identified elsewhere in the record as non-H-2B workers. Jones also testified that he did not remember providing Zylstra with the information substantiating corrections Zylstra made on the business data form during their meeting (Tr. 592, RX 10).

[62] It was also copied to Billy Ponds, Jones' attorney at the time. *Ibid.*

subsequent telephone conversation, Zylstra stated that he was unable to contact Ponds and that the case would proceed if Jones did not pay the amount requested (Tr. 607).[63]

Jones also testified that he had a meeting with Ms. Beason, DOL's attorney, and Mr. Howard, his new attorney, in 2002 (Tr. 609). According to Jones, Ms. Beason said "[w]e're not here to negotiate," stated that a debarment action was pending, and did not offer him any opportunity to come into compliance by paying the amount due (Tr. 611). He further testified that he felt the case was already decided based primarily on statements of disgruntled employees who were laid off in July (Tr. 611). Jones stated that he was willing to pay an amount due if accurately calculated, but he felt that this had not been done because DOL never asked for the same amount twice and "[came] up with from 107,000, Ron Zylstra's figure, to 90,000, Ms. Gather out in Baltimore . . . to 130,000 on whatever figures that we received, and now today it's at 160 some thousand" (Tr. 612-13, 624-25). He further testified that the Agency is holding about $89,000 of the contract money without advising him whether it is accruing interest (Tr. 614).

Jones took exception with the back wages and benefits calculations prepared by Kelly (DX 24). Reviewing Kelly's summary and a copy of Respondents' payroll records for 2001 (DX 5), he testified that the following employees should not have been included in the Agency's calculations because they were either supervisors or did not worker on the contract at all:[64]

Employee	Job Title	Salaried	Worked on the Service Contract
Thomas Fields	Supervisor	Yes (minimum $22,000)	No
Emmy Frenz	Administrative Assistant	Yes (under $20,000)	No
Arinda Johnson[65]	File Clerk	No	No
Larry Ball	Supervisor	(Not specified)	Yes
Don Battle	Mechanic (trucks, two and four cycle equipment)	Yes (under $20,000)	No
Calvin Hargrove	Supervisor		Yes
Jose Hernandez	(Not specified)	(Not specified)	No
Ronique Howard	Clerk	No	No
Kevin Jones	Supervisor	Yes (under $23,000)	Yes
Jose Juarez	(Not specified)	(Not specified)	No
Hector Monroy	(Not specified)	(Not specified)	No
Carlos Morales	(Not specified)	(Not specified)	No
Jaime Morales	(Not specified)	(Not specified)	No
Antonion Orellana	(Not specified)	(Not specified)	No

[63] Jones testified that this conversation "started getting intense, more disrespectful and just non-professional" (Tr. 607).
[64] Luis Aguilera and Joseph Camacho appear in the payroll journal, but were neither named by Jones, nor included in the government's list of wages due (DX 5, DX 24).
[65] DOL did not claim back wages for this employee (DX 24).

Employee	Job Title	Salaried	Worked on the Service Contract
Mario Perez	(Not specified)	(Not specified)	No
Jose Romero	(Not specified)	(Not specified)	No
Larry Thompson	Supervisor	Yes (under $25,000)	Yes
Jose Vasquez	(Not specified)	(Not specified)	No
Katherine Benham	Office manager	Yes ($28,000)	Yes (clerical work)
Rudy Westby	Office Assistant and Interpreter	No	No
Dwayne Jones	Grass Cutter	(Not specified)	No
Kenneth Johnson	Mechanic (trucks)	No	No
Michael Williams	Mechanic (two and four cycle equipment)	No	No
Natasha Swanson	Clerk	No	No (started work in Jan. or Feb. 2002)
Hoyt Baker	(Not specified)	(Not specified)	No
Chris Bowie	(Not specified)	(Not specified)	No
Delnar Carey	(Not specified)	(Not specified)	No
Roland Evans	(Not specified)	(Not specified)	No

(Tr. 729-44, 749, DX 5, DX 24).

Jones further testified that, of the 36 non-H-2B employees for whom the government was claiming Respondents owed back wages and benefits, only ten individuals worked on the subject contract. He identified those workers as: Larry Ball; Maynor Berganza; Manuel Duarte; Ventura Duarte; Thomas Fields; Haroldo Garcia; Calvin Hargrove; Kevin Jones; Jerome Strod; and Larry Thompson (Tr. 746-47, DX 24). Jones acknowledged that in answering the Agency's interrogatories, he omitted by oversight the names of a number of workers who he alleged did not work on the subject contract (Tr. 881-83, DX 33).[66] Jones further stated that DOL's calculations for Manuel Duarte were incorrect after the pay period ending September 22, 2001 because Duarte no longer worked on the service contract at that time (Tr. 747, DX 24). According to Jones, the same errors existed with respect to calculations for Ventura Duarte, starting with the pay period ending October 6, 2001 (Tr. 749).

Jones further testified that, following his conversations with Zylstra, he made his own calculations regarding back wages and benefits owed to Respondents' workers around November 2002, but disposed of those computations without providing a copy to DOL because they "weren't exactly the calculations . . . [s]ome formulas of some owed wages" (Tr. 868, 913, DX 19). Jones also acknowledged that he never produced a copy of the company's employee manual to the Agency, but testified that it was because the manual was not yet completed (Tr. 873, DX 38). A letter dated March 28, 2001 from Jones to Kathy Benham offering employment as Respondent's Office Manager notes that "[a]s an employee of Lawn Restoration . . . you will be provided with a copy of the LRS employee manual . . . which outlines our personnel policies thoroughly, and [will be required to] sign and return [a Receipt & Acknowledge form]" (DX 37).

[66] Chris Bowie, Dalnar Carey, Ronald Evans, Devon Jackson, Orellana Antonion, Emmy Frenz. *Ibid.*

Jones testified that he did not provide the workers with the English draft of the manual (Tr. 904).[67]

On redirect examination, Jones acknowledged that he failed to admit he issued paychecks to the workers (Tr. 789-97, DX 34, RX 41, 25).[68] Jones also acknowledged that he provided inaccurate information to a Maryland state government office on one occasion (Tr. 822-24, DX 36).[69]

III. SUMMARY OF THE PARTIES' ARGUMENTS

In its post-hearing brief ("DOL Br."), DOL argues that because Respondents failed to maintain records differentiating the hours worked on the contract from non-contract hours, a presumption arises thatall of Respondents' employees worked exclusively on the subject contract during the entire period of contract performance (DOL Br. at 13, 19). DOL further argues that Respondents failed to rebut this presumption, and, as a result, a finding must be made that 21[70] non-H-2B workers worked exclusively on the subject contract. *Id*. at 13-16. DOL also contends that Respondents should not be allowed to offset wages and fringe benefits underpayments by the value of the various facilities provided to the workers, because Respondents never documented an intention to provide facilities in lieu of monetary wages and charged an excessive amount for rent. *Id*. at 17; 46-51. DOL further claims that Respondents presented inconclusive evidence regarding the alleged purchases of food, furniture, bedding, and other household supplies, and failed to show "how much money was spent on each employee." *Id*. at 18.

With regard to the contract period, DOL contends that Respondents failed to rebut a presumption that all their workers performed contract work throughout the entire contract term from March 14, 2001 to March 14, 2002. *Id*. at 18-19. DOL also points out that Chavez's diary suggests that he worked on the contract in October. *Id.* at 18-23. In addition, DOL seeks back wages for the pre-shift activities, holidays, time spent in training and/or orientation, as well as miscellaneous and equipment damage deductions, and asserts that its back wage calculations are reasonable. *Id.* at 29-44. Finally, DOL is seeking debarment of Respondents under the SCA and prejudgment interest on the back wages owed. *Id.* at 57-70.

According to Respondents' post-hearing brief ("R. Br."), in light of my prior ruling granting the Agency's motion for partial summary judgment, the sole issues remaining to be determined in this case are: (1) the correct amounts of back wages and fringe benefits owed by Respondents to its employees; and (2) whether unusual circumstances exist which warrant a reprieve from debarment of Respondents.

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[67] The government, however, produced a Spanish version of the manual at the hearing (DX 38).
[68] He also acknowledged that Respondents' Exhibit 41 does not contain all the checks that the Agency was able to obtain (DX 25).
[69] In a letter dated 3/8/01 to John Demeo of the Maryland Department of Labor, Licensing, and Regulation ("MDLLR"), Jones stated that Lawn Restoration had no employees in the State of Maryland at that time, while in fact Emmy Frenz and Arinda Johnson were both working in Maryland at that time. *Ibid.*
[70] This number includes Pedro Hernandez Rebolleda mistakenly listed by DOL as a non-H-2B workers (Att. A).

Regarding the first issue, Respondents allege that DOL's computations significantly exaggerate the amounts of wages and benefits that may be actually due Respondents' employees. Specifically, Respondents allege that DOL's calculations are based on the following erroneous assumptions: "(1) that all of Respondents' work was service contract work, (2) that work on the subject contract continued through the pay period ending March 23, 2002, (3) that everyone listed on Respondents' payroll was a "service employee" as defined by 41 U.S.C. § 357(b), (4) that none of Respondents' employees received compensatory time in lieu of overtime or holiday pay, (5) that there were never any overpayments made to a service employee that remained unreturned, (6) that the Chavez document accurately reflects 'training' hours for all H-2B employees on April 5, 2001, (7) that every single day that a service employee worked, a one-hour lunchtime deduction was made from the employee's total work hours for that day, and (8) that the addition after the July 28, 2001 pay period of one hour each work day for [pre-shift activities] . . . was justified." *Id.* at 9. Respondents also state that the computations are flawed because investigator Kelly "failed to check for accuracy by comparing all of Respondents' time and attendance records with the underlying employee sign-in sheets." *Id.* at 9-10.

With regard to the issue of the Agency's right to collect prejudgment interest, Respondents argue that DOL has seized their property ($89,871.32 in withheld contract funds) without due process, the Agency has provided no justification for utilizing the Internal Revenue Service's underpayment rate for income taxes as a basis for computing prejudgment interest, and DOL has failed to provide the Court with sufficient evidence to evaluate the figures that the Agency has included in its "estimates" of interest due. R. Br. at 34.

Finally, with regard to the issue of debarment, Respondents argue that their violations of the statutes and regulations were not willful, they cooperated in the investigation, and they would have repaid the back wages owed to workers if DOL had correctly calculated the amount due. *Id.* at 35-47. They therefore assert that debarment is neither required nor necessary.

In its Reply Brief ("DOL R. BR."), DOL notes that Respondents failed to dispute the Agency's claim that various deductions made from the wages paid to employees who worked on the D.C. contract were inappropriate, including deductions for rent, "fines" for missing Social Security numbers, and equipment damage. DOL R. Br. at 1-3. The Agency further notes that Respondents failed to challenge DOL's arguments that Respondents owe workers compensation for holiday and overtime work, that workers are entitled to back health and welfare benefits, and that Respondents failed to maintain complete and accurate records. *Id*. at 3-6.

With respect to the issue of back wages, DOL argues that, because Respondents failed to maintain complete and adequate records for workers providing services under the D.C. contract, the Agency can satisfy its burden of proving the amount of wages owed by showing "that the employees have in fact performed work for which they were improperly compensated and that the amount and extent of such work can be reasonably inferred." *Id*. at 6. The burden then shifts, according to DOL, to Respondents to present evidence establishing "the precise amount of work performed or . . . evidence to negate the reasonableness of the inferences drawn from the Agency's evidence. " *Id*. at 7. DOL's inferences and back wage calculations are, it asserts, reasonable, and Respondents have failed to meet their burden to prove otherwise. *Id*. at 8-20.

Regarding the Agency's entitlement to collect prejudgment interest on wages owed to Respondents' workers, DOL states that it is well established that prejudgment interest should be assessed on back wages to fully compensate claimants, and courts have awarded interest at the IRS prejudgment rate under various statutes including the SCA. *Id*. at 22.

Finally, with regard to the issue of debarment, DOL notes that it is the "standard course of action" in SCA cases to debar contractors who violate the statute. *Id*. at 31. Respondents have, according to the Agency, failed to demonstrate any unusual circumstances which might excuse them from debarment. *Id*. at 32.

IV. DISCUSSION

A. Back Wages and Fringe Benefits Owed by Respondents to Covered Workers.

As noted previously, I have already found in my order granting the Agency's motion for partial summary judgment that some of Respondents employees were covered by the terms and conditions of the D.C. contract, that those workers were not paid in accordance with the requirements of the contract, and that they were therefore entitled to back wages and benefits consistent with its terms. In granting partial summary judgment, I further determined that Respondents had violated the record keeping requirements of 29 C.F.R. § 4.179 and, pursuant to that regulation, it was presumed that all Respondents' employees worked on the contract on the dates, and for the hours, reflected in Respondents' payroll and time and attendance records.

In order to determine what back wages and benefits are owed by Respondents to their employees, I must now determine whether all or only some of those employees are covered by the D.C. contract. I must further decide, with respect to the employees found to be covered by the terms and conditions of the contract, whether all or only some of the time they worked is governed by the contract, whether those employees were paid wages and benefits consistent with the requirements of the contract, and, if not, what wages and benefits are now owed to them by Respondents. Finally, I must determine which if any of the deductions Respondents' made from workers' pay checks were authorized and whether Respondents are entitled to offset wages and benefits for expenses incurred on behalf of the covered workers. Before turning to these particular issues, however, a preliminary matter warrants a brief discussion.

At the time of the formal hearing in this case, the Agency introduced as an exhibit a number of spreadsheets prepared by John Kelly, Assistant District Director of DOL's Wage and Hour Division, reflecting his calculations regarding amounts due Lawn Restoration's workers as a result of Respondents violations of the SCA and CWHSSA (DX 24). Kelly testified about the methodology he used to prepare the spreadsheets, and the assumptions upon which they were based. A number of inaccuracies contained in the spreadsheets were noted during Kelly's testimony regarding, *inter alia*, the duration of the contract, the identification of employees who were covered by the contract, and the number of hours worked on certain days by various covered employees.

Subsequent to the hearing, the Agency submitted revised spreadsheets with its post-hearing brief ("Att. A," "the revised Kelly spreadsheets," or simply "the revised spreadsheets"). Respondents have challenged the Agency's right to rely on the revised Kelly spreadsheets as evidence in this case, asserting that "the Agency can no more substitute the demonstrative evidence that was offered in support of Jack Kelly's testimony than Respondents can substitute the demonstrative photographic evidence that was offered in support of Jeffrey Jones's testimony." R. Br. at 8. The Agency responds:

> The spreadsheets, in and of themselves, are not evidence presented to assert the truth of the Agency's claims for back wages. Rather, the spreadsheets quantify and summarize the back wages owed by the Respondents based on inferences drawn from the substantive evidence presented at the hearing by both parties, including the payroll journals, the time and attendance records, the employees' statements and testimony, as well as other evidence. They were created to assist the Court in ascertaining and quantifying the Agency's claims for back wages, to which the Respondents had adequate opportunity to respond in their post-hearing brief. Thus, it is appropriate to revise the calculations based on the proof that was admitted into the record.

DOL R. Br. at 25.

The spreadsheets to which Respondents object are, as the Agency correctly acknowledges, simply summaries of DOL's views concerning the damages owed by Respondents as a result of their underpayment of wages and fringe benefits to workers covered under the subject contract. As such, I have considered them in addition to the other arguments of counsel. As is more fully explained below, I find the revised spreadsheets to be supported by the evidence in some respects, but unsupported by the evidence in others. Inasmuch as these documents serve as a ready reference for identifying Respondents' employees, as well as the hours they allegedly worked and their compensation rate, I will refer to them frequently in discussing the issues presented below.

1. Respondents' Workers Whose Wages Are Governed By The Contract.

The revised Kelly spreadsheets list a total of 59 workers who were employed by Respondents during the term of the subject contract: 23 individuals are identified as H-2B workers and 36 are identified as non-H-2B workers. It is undisputed that some of these 59 workers are covered, in whole or in part, by the wage and benefits provisions of the subject contract. It is also undisputed that some of these 59 employees are not covered by the terms of the subject contract. The parties disagree over whether the remaining workers are covered at all by the contract.

a) H-2B Workers.

Respondents concede, and the evidence confirms, that all 23 H-2B employees named by the Agency worked solely on the subject contract. Accordingly, the wages and benefits of all 23

H-2B workers are covered by the contract, and they are entitled to payment of wages and benefits consistent with the terms provided therein.

One of the individuals identified in the revised Kelly spreadsheets as "Rebolleda Hernandez Pedro" is erroneously listed twice; once as a non-H-2B worker and again as an H-2B worker.[71] Respondents and the Agency agree that this individual is actually an H-2B worker. He is therefore covered under the contract and entitled to the wages and benefits described therein as one of the 23 H-2B workers. However, the revised Kelly spreadsheets reflect two different pay periods for this individual – one ending April 6, 2001 for the H-2B employee and one ending April 21, 2001 for the non-H-2B employee.[72] The hours noted for the H-2B employee total 7.5, while the hours listed for the non-H-B worker total 67. As explained below, the record supports a finding that Hernandez worked a total of 67 hours while employed by Respondents.

b) Non-H-2B Workers.

With respect to the 35[73] non-H-2B workers identified in the revised Kelly spreadsheets, five are conceded by the Agency to be administrative employees who are exempt from the wage and fringe benefits requirements of the subject contract, and neither the total back wages and fringe benefits calculations, nor the pre-judgment interest calculations contained therein, include money attributable to these employees. The five administrative employees are Katherine Benham, Emmy L. Frenz, Ronique M. Howard, Natasha Swanson, and Ruby Westby. The record confirms that each of these individuals is appropriately identified as an administrative worker, and they are therefore exempt from the wage and benefits provisions of the D.C. contract.

Of the remaining 30 non-H-2B workers, Respondents concede that ten of these individuals performed some work under the subject contract. The ten non-H-2B workers who Respondents acknowledge worked under the contract are: Larry Ball; Maynor Berganza; Manual Duarte; Ventura Duarte; Thomas Fields; Haroldo Garcia; Calvin Hargrove; Kevin Jones; Jerome Strod; and Larry Thompson. Respondents assert, however, that three of these individuals – Thomas Fields, Kevin Jones, and Larry Thompson – are salaried supervisors and not subject to the wage and benefits provisions of the contract. My findings with respect to Thomas Fields, Kevin Jones, and Larry Thompson are discussed further below. With regard to the remaining seven non-H-2B workers conceded by Respondents to have worked on the contract, the record confirms, and I find, they are entitled to payment of wages and benefits at the contract rate for work deemed to have been performed thereunder.

[71] The worker's name is shown under non-H-2B employees as "Reboltada Hernandez, Pedro" and under H-2B employees as "Rebolleda Hernandez Pedro." *See* Att. A at 8-9, 18-19. There are several other variations of this name elsewhere in the record, but for the sake of simplicity, I will refer to him as "Pedro R. Hernandez" or "Hernandez."

[72] Furthermore, this worker appears to be the same individual identified in Respondents' payroll records as "Hernandez, Pedro R," s*ee, e.g.*, DX 5 at 31, 35, 42, 50, and 58, yet there are no wages recorded in the payroll as paid to this employee, nor is there a "Hernandez, Pedro R" listed in the revised Kelly spreadsheets either as an H-2B employee or as a non-H-2B employee.

[73] Although there are 36 non-H-2B employees listed, one (Pedro Reboltada Hernandez) is actually an H-2B worker.

The Agency contends, and Respondents contest, that the remaining 20 non-H-2B workers are subject to the wage and hour provisions of the D.C. contract. These employees are identified in the revised Kelly spreadsheets as: Romero Alcides; Hoyt Baker; Don C. Battle; Chris Bowie; Delnar Carey; Ronald Evans; Jose Aceve Hernandez; Devin Jackson, Kenneth Johnson; Dwayne Lewis Jones; Jose L. Juarez; Clarence Mahoney; Perfecto Monroy; Carlos A. Morales; Jaime Morales; Antonion Orellana; Mario Perez; Jose L. Romero; Jose H. Vasquez; and Michael Williams. Respondents also assert that three of these individuals – Don Battle, Kenneth Johnson, and Michael Williams – are not covered by the D.C. contract requirements because they are "mechanics" rather than "service workers." They further assert that the remaining seventeen workers are not covered by the wage and benefits provisions of the D.C. contract because these employees worked exclusively performing services for residential customers of Lawn Restoration.

(1) Coverage of Salaried Employees for Overtime and Holiday Pay.

According to Respondents, "[s]alaried employees who worked overtime and holidays were permitted to earn compensatory hours, which they were free to use at a later time." R. Br. at 18. They therefore assert that, "[b]ecause Respondents had a compensatory time system for salaried employees, all alleged deficiencies included in the Kelly spreadsheet for nonpayment of overtime and holiday pay to salaried service employees [*e.g.*, Thomas Fields, Kevin Jones, and Larry Thompson] must be deducted." *Ibid*.

In its reply brief, DOL states that, "[e]ven if these three individuals were salaried as the Respondents contend, they clearly were service employees under the subject contract and thus, were not exempt from the requirements of the SCA and CWHSSA." DOL R. Br. at 11. Since they are not otherwise exempt from the provisions of these statutes as executive, administrative, or professional employees, according to the Agency, they are entitled to holiday pay and overtime consistent with the terms set forth in the D.C. contract. *Ibid*.

The SCA defines a "service employee" as "any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 . . . other than any person employed in a bone fide executive, administrative, or professional capacity, as . . . defined in part 541 of title 29 Code of Federal Regulations . . . ." 41 U.S.C. § 357(b). According to 29 C.F.R. § 4.155, "any person, except [a person employed in a bona fide executive, administrative, or professional capacity], who performs work called for by a contract or that portion of a contract subject to the Act is, per se, a service employee . . . and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements." 29 C.F.R. § 4.155 (2003); *see also* 29 C.F.R. §§ 541.1,[74] 541.2,[75] and 541.3.[76] Regulations

[74] A bona fide executive employee is an employee who (1) has a primary duty consisting of the management of the enterprise in which he or she is employed, customarily and regularly directing the work of two or more other employees; (2) has the authority to hire or fire other employees; (3) customarily and regularly exercises discretionary powers; (4) does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which

applicable to the CWHSSA further provide that "[t]he wages of every laborer and mechanic for performance of work on [contracts subject to the CWHSSA] must include compensation at a rate not less than 1 ½ times the employees' basic rate of pay for all hours worked in any workweek in excess of 40." 29 C.F.R. § 4.181(b) (2003).

There is nothing in the record to support a finding that Thomas Fields, Kevin Jones, or Larry Thompson are exempt from the provisions of the SCA and CWHSSA as executive, administrative, or professional employees.[77] These three employees supervised crews of lawn maintenance personnel, transported workers to and from work sites, loaded and unloaded equipment from the trucks, obtained gasoline for the trucks and equipment, and performed lawn maintenance services themselves (*see, e.g.,* Tr. 180, 244, 410-11, 422, 433, 438-39, 726-27). Since they are properly classified as "service employees" and not otherwise exempt from coverage under the SCA and CWHSSA, Respondents were required to compensate them at the contract rate for overtime and holidays, irrespective of whether they were given "compensatory time" for overtime hours worked.

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are not directly and closely related to the performance of the management work described above; and (5) is compensated for his services on a salary basis at a rate of not less than $155 per week.

[75] A bona fide administrative employee is an employee (1) whose primary duty consists of either the performance of office or nonmanual work directly related to management policies or general business operations and who customarily and regularly exercises discretion and independent judgment; (2) who regularly and directly assists a proprietor or an employee employed in a bona fide executive or administrative capacity, or who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; and (3) who does not devote more than 20 percent of his or her hours worked in a workweek to activities which are not directly and closely related to the performance of the work described above; and (4) who is compensated on a salary or fee basis at a rate of not less than $155 per week.

[76] A bona fide professional employee is an employee (1) whose primary duty consists of (a) work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of study, as distinguished from a general academic education and from an apprenticeship, or (b) work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee, or (c) work requiring theoretical and practical application of highly-specialized knowledge in computer systems and who is employed and engaged in these activities as a skilled worker in the computer field; and (2) whose work requires the consistent exercise of discretion and judgment in its performance; and (3) whose work is predominantly intellectual and varied and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (4) who does not devote more than 20 percent of his or her hours worked in the workweek to non-essential activities of the work described above; and (5) who is compensated for services on a salary or fee basis at a rate of not less than $170 per week.

[77] Although these workers may have "customarily and regularly direct[ed] the work of two or more other employees," Respondents did not argue, and the record does not confirm, that they meet the other criteria set forth in the regulation, *e.g.*, authority to hire or fire other employees, devotes no more than specified percentage of time to activities not directly and closely related to performance of management work, which is necessary to be a "bona fide executive employee." 29 C.F.R. § 541.1.

(2) Coverage of "Mechanics" Under the Contract.

Respondents' also claim that Don Battle, Kenneth Johnson, and Michael Williams are not covered by the wage and benefits requirements of the subject contract. They assert that these individuals "were mechanics who worked on [Jeffrey Jones's] equipment at his warehouse, and they performed no work on the District parks grass cutting contract." R. Br. at 14.

To the extent Respondents allege that Battle, Johnson, and Williams are not covered simply because they are "mechanics," neither the SCA nor the CWSSA exempt such workers from coverage. On the contrary, both acts exempt only executives, administrative employees, and professionals. Furthermore, as noted above, the regulations expressly *include* mechanics among the workers who are covered by the CWSSA. 29 C.F.R. § 4.181(b) (CWHSSA "applies generally" to contracts requiring employment of "laborers and mechanics"). The fact that these workers are "mechanics" therefore does not justify excluding them from coverage.[78]

Similarly, the fact that Battle, Williams, and Johnson may not have been out in the D.C. parks and recreational centers mowing grass or performing similar services does not relieve Respondents of their obligation to comply with the wage and benefits provisions of the contract with respect to these workers. Section 4.150 of Title 29, C.F.R., provides, in relevant part:

> All service employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms *or in performing other duties necessary to the performance of the contract*, are thus subject to the Act unless a specific exemption (see §§ 4.115 *et seq*.) is applicable."

29 C.F.R. § 4.150 (2003) (italics added).

Williams was identified by Jones as a salaried equipment mechanic who worked on two- and four-cycle equipment (Tr. 740-41). Similarly, Jones described Battle as a salaried mechanic who worked on Lawn Restorations trucks as well as two- and four cycle equipment (Tr. 731-31). Johnson was identified by Jones as an hourly employee who worked on Respondents' trucks (Tr. 740). Maintaining the mowers, edgers, blowers and other equipment used for performing services under the D.C. contract, as well as maintaining the vehicles used to transport the equipment to and from the sites at which work was performed under the contract, clearly falls within the purview of "duties necessary to the performance of the contract." 29 C.F.R. § 4.150. These employees are therefore entitled to compensation at the contract rate.

In addition, Respondents failed to adequately segregate in their records hours spent by employees performing covered and non-covered work. Regulations adopted by the Agency under the SCA provide, in relevant part, that "[c]ontractors . . . under contracts subject to the [SCA] are required to comply with its compensation requirements throughout the period of performance on the contract . . . with respect to all employees who in any workweek are engaged

[78] I also note that the workers identified by DOL in the original complaint filed in this case expressly included "laborers *and mechanics* employed in the performance of [the D.C.] contract . . . ." Complaint at ¶ VI. (b) (italics added).

in performing work on such contract." 29 C.F.R. § 4.179. If a contractor devotes a portion of its time to work which is not part of the SCA contract, the employer is required by the regulations to "identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each . . . employee performed work on such contracts." *Ibid.*; 29 C.F.R. § 4.185; *see also* 29 C.F.R. § 4.178. Otherwise, a presumption arises that all employees worked on the contract during the period of its performance "unless affirmative proof establishing the contrary is presented." 29 C.F.R. § 4.179.[79]

Respondents have failed to present adequate "affirmative proof establishing" that Battle, Johnson, and Williams did not perform services relating to the contract. The record shows clearly that these three employees worked on Lawn Restoration's vehicles and lawn maintenance equipment. The record does *not* show that the vehicles and equipment upon which they worked were utilized by Respondents exclusively for non-contract related work. These workers were therefore entitled to compensation consistent with the provisions of the subject contract.

(3) Respondents' Residential Employees.

During discovery in this proceeding, Respondents identified ten non-H-2B employees as workers involved in "Residential Cutting." DX 33 at 4-5 (identifying Jose Hernandez, Jose Juarez, Monroy Perfecto, Carlos Morales, Jamie Morales, Mario Perez, Jose Romero, Jose Vazquez, Dwayne Jones, and Clarence Mahoney). They also identified at trial an additional seven non-H-2B workers (Romero Alcides, Hoyt Baker, Chris Bowie, Delnar Carey, Ronald Evans, Devin Jackson, and Antonion Orellana) as working "exclusively on residential properties." R. Br. at 15.

As stated above, Respondents failed to maintain accurate and adequate records identifying contract and non-contract employees or segregating contract versus non-contract hours worked by their employees. As a result, all of Respondents' employees are presumed to have performed work under the contract and are entitled to compensation consistent with its terms. To rebut this presumption, Respondents must introduce affirmative evidence establishing the contrary. 29 C.F.R. § 4.179.

According to the Agency, Respondents have failed to present affirmative proof that the above-mentioned seventeen non-H-2B workers did not work on the D.C. contract. DOL Br. at 14. DOL argues:

> To rebut the presumption that all non-exempt employees performed work on the subject contract, the Respondents have relied on the testimony of Respondent Jones. Respondent Jones essentially relied on his memory to identify which employees worked on the contract. Respondent Jones stated that the same employees always did residential work exclusively, while the other employees only performed contract work. *See* Tr. at 716-17. Respondent Jones testified that he knew which employees worked on the contract versus residential properties by

[79] Similarly, an employee performing work on the contract during part of a workweek "shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented." *Ibid.*

> the employees' names. *See* Tr. at 729. However, Respondent Jones admitted that he was not always at the warehouse each morning and that the employees were assigned to different work crews daily by their supervisors. *See* Tr. at 760-61. Thus, Respondent Jones cannot definitively state that certain employees never worked in the D.C. parks, and his testimony regarding which employees worked on the contract as opposed to which employees exclusively performed residential work should not be credited.

Ibid.

Respondents assert that "[t]here would be no administratively logical reason for switching the employees back and forth [from residential work to work on the D.C. contract]." R. Br. at 17. Respondents further state:

> Moreover, it is undisputed that the residential lawn workers had no supervisors. Thus, it is immaterial whether or not Jeffrey Jones was present at every morning assignment of work crews. All of the company's supervisors were making assignments only to the employees whom they supervised, that is, the H-2B employees. So, even if Mr. Jones did not know which particular District park an H-2B employee had been taken to on any given day, he did know that all H-2B workers had been taken to work in District parks; and all residential lawn employees had been taken to work at residential properties.

Ibid. (transcript citations omitted).

Prior to their meeting in October 2001, Investigator Zylstra wrote to Jones on September 28, 2001 and requested, *inter alia*, payroll and time records for all employees for the prior two years, a list of all employees with addresses and phone numbers, and a list of all salaried employees for whom Jones claimed an exemption from overtime earnings (DX 20). On October 4, 2001, Jones completed a "Request for Business Data" form which had been attached to Zylstra's letter on which Jones noted, *inter alia*, Lawn Restoration had been in business for thirteen years, he was the only owner and corporate officer of the company, he and Paychex were responsible for Respondents' pay practices, he had 10 employees at that time, and none of his employees were salaried employees (DX 26).

Zylstra's narrative report of the investigation states that "Lawn Restoration Service, Inc., is exclusively engaged in the cutting and trimming of grass on property owned and managed by the Government of the District of Columbia, ("DC"), Department of Recreation and Parks." (DX 19 at 2). He testified that the sources of that information were Jones and interviews of Lawn Restoration employees (Tr. 133). Zylstra testified that, when he met with Jones at Respondents' office on October 9, 2001, he asked Jones whether the company did any work other than government contract work (Tr. 137). When asked why he made such an inquiry, he testified:

> When conducting a, an examination of the records under the Service Contract Act, I as the investigator need to know what hours on the pay records are not bona

> fide SCA hours for they would fall outside the scope of the SCA investigation. They would not be subject to prevailing wage. That, that information would be indispensable in conducting an audit of the record, such as hours devoted to commercial work would be subject to the Fair Labor Standards Act and not the SCA prevailing wage; and I would need to know this looking at the pay records.

(Tr. 137-38). On cross-examination, Zylstra testified that he believed, but was not certain, he asked Jones whether he had any residential clients (Tr. 202).

Jones testified at the hearing that, prior to obtaining the D.C. contract, his company performed only residential work (Tr. 536). According to Jones, during the year 2001, Lawn Restoration had approximately 25 to 35 residential customers (Tr. 530). He acknowledged, however, that Respondents' records did not differentiate in any way between residential and contract work performed by employees, such as by identifying the workers as "residential" or "contract" workers, nor did they identify the hours devoted to each type of work (Tr. 777-79). Jones further testified that he spent only fifty percent of his time at the warehouse, played no role in assigning workers to different crews, was not always present at the warehouse when supervisors made such assignments, and did not know if any particular employee stayed with the same crew every day (Tr. 779). He also admitted that the only document reflecting residential work performed by Respondents was a "residential sheet of properties" and acknowledged that he could not present any invoices for such work (Tr. 780, 880).

As the Board of Service Contract Appeals has noted, "[w]hen employees spend a portion but not all of their time on contracts subject to the SCA, it is the employer's responsibility to segregate the hours between covered and non-covered work[, and] . . . if an employer fails to do this, it is subject to the wage required by the SCA wage determination for all hours worked." *James Bishop d/b/a Safeway Moving & Storage*, BSCA Case No. 92-12 at 3-4 (Nov. 30, 1992). It would be wholly inappropriate to penalize covered employees by denying them payment of the required compensation simply because they were unable to present substitute records. *See Amcor, Inc. v. Brock*, 780 F.2d 897, 900 (11th Cir. 1986) citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). It is the employer's burden "to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." *Ibid*.

Although the record suggests that some of Respondents' workers were likely engaged in non-contract work, Respondents have presented insufficient evidence to overcome the regulatory presumption that all of the seventeen non-H-2B workers identified by Jones as "residential workers" are covered under the contract. This finding is based on at least three factors.

First, Respondents failed to produce any documentary evidence identifying workers engaged solely in residential work or reflecting when, or to what extent, such workers may have performed non-contract work. Neither the payroll records nor the time sheets maintained by Respondents reflect any classification of workers as either "residential" or "commercial"

employees (Tr. 778).[80] Similarly, although the "2001 Residential Cut List" produced by Respondents identifies several District of Columbia addresses, it does not identify any employees as members of the "teams" which allegedly performed work at those addresses (RX 76 at 1169-70).[81] Furthermore, no explanation was ever provided regarding when, how, or by whom the document was created, and there are no invoices or other records which might support a finding that non-contract residential work was performed by certain workers during a particular period. As such, I find Respondents' "cut list" to have little probative value with respect to whether particular employees performed residential work or, if so, the percentage of time they engaged in such activities. Respondents' failure to provide, either during Zylstra's investigation or at the formal hearing in this matter, *any* documentation supporting their contention that non-H-2B workers performed non-contract work, other than the two-page "2001 Residential Cut List," is compelling evidence which undermines Jones's testimony that there was a strict division of labor between "residential" and "contract" workers.

Second, Jeffrey Jones offered inconsistent evidence with respect to which specific workers performed only residential work. Prior to the hearing in this case, Jones identified in response to the Agency's discovery requests, only ten individuals who were allegedly engaged exclusively in "Residential Cutting" (DX 33).[82] However, at trial, Jones identified another seven workers as residential workers.[83] The only explanation given by Jones for these inconsistencies was that they were due to "oversight" (Tr. 882). Furthermore, for whatever reason, Jones elected not to call any of the identified workers as witnesses at the hearing, and his failure to do so suggests that their testimony might not have fully supported his testimony. *See, e.g., United States v. Wilson*, 322 F.3d 353, 364 (5th Cir. 2003) (Government's failure to call its own employees as witnesses when they had crucial information about a dispositive issue of fact gave rise to "particularly strong" adverse inference against it); *United Auto Workers v. NLRB*, 459 F.2d 1329,1336 (D.C. Cir. 1972) ("Simply stated, the [adverse inference] rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him."). Similarly, the Lawn Restoration workers who were called by Respondents at the hearing were not asked to identify any co-

[80] Jones was asked during his deposition prior to trial whether he had documentation pertaining to work performed by Lawn Restoration at private residences, and indicated that he did (Tr. 779-80). However, at trial, he acknowledged that no invoices or documents other than the residential "cut list" had ever been produced (Tr. 780).
[81] The list is grouped by "Team A" through "Team G" and lists only street names, without house numbers, for all but a few locations. The list also includes seven Maryland locations, including 4907 Taylor St., Bladensburg, MD, which would be next door to the residence at 4909 Taylor St. where the H-2B employees resided (RX 76 at 1170).
[82] The ten employees identified in Respondents' supplemental discovery responses were Jose Hernandez, Jose Juarez, Monroy Perfecto, Carlos Morales, Jamie Morales, Mario Perez, Jose Romero, Jose Vazquez, Dwayne Jones, and Clarence Mahoney. The three identified by Respondents as mechanics are Don Battle, Kenneth Johnson, and Michael Williams.
[83] Jones added at the hearing the following six non-H-2B employees: Chris Bowie, Delnar Carey, Ronald Evans, Devin Jackson, Antonion Orellana, and Hoyt Baker (Tr. 736, 744, 881-83). He also identified during his testimony "Jose Romero" as the person listed on line 4, page 1of the original Kelly spreadsheet as "Alcides Romero" (DX 24). Both the original and revised Kelly spreadsheets reflect work performed by "Alcides Romero" during the pay periods ending 7/14/01 and 7/28/01. Although Respondents' payroll records do not list any individual by this name, Respondents' time and attendance records for these two pay periods list "Alcides Romero" as having worked the hours noted in the Kelly spreadsheets (DX 11 at 0667, 0723). Kelly acknowledged at trial that some names were reflected on time and attendance records and not payroll records (Tr. 302). Kelly also testified that checks were signed by Jones (versus being generated by Paychex) with respect to these two pay periods (Tr. 354-55).

workers who were engaged exclusively in performing non-contract work.[84] Given Jones's inconsistent identification of his "residential workers," and Respondents' failure to call such workers, or question their own witnesses about them, I find Jones's testimony regarding this issue not credible.

Finally, irrespective of the fact that Zylstra's testimony was somewhat equivocal regarding whether he expressly asked Jones if Lawn Restoration had employees engaged in residential work, I have no doubt that Jones understood the importance of identifying workers who performed non-contract-related services. Had such records existed, Jones certainly would have produced them to minimize his potential liability for the underpayment of wages and benefits, even if they had never been requested. Respondents offered no such evidence up to and including the time of the formal hearing in this case. Like their failure to call witnesses who are clearly within their control, Respondents' failure to produce records relating to "residential workers" justifies an inference that, if they exist, these records would be unfavorable to Respondents' case. *United States v. Wilson*, *supra*; *United Auto Workers v. NLRB*, *supra*.

Given their failure to maintain accurate records segregating contract and non-contract work, it is Respondents' burden to rebut the presumption that all of their workers performed services under the D.C. contract. I find Jones's testimony that various non-H-2B workers did not perform work on the D.C. contract, which is the only evidence offered by Respondents on this issue, is not credible, and therefore find that Respondents have failed to rebut the presumption that these workers are covered thereunder.

2. Employee Time Attributable to the D.C. Contract.

The Agency and Respondents disagree regarding when Respondents began working on the subject contract and when they stopped performing work under the contract (DOL Br. at 19-23; R. Br. at 10-12). Respondents assert that DOL originally identified the period covered by the contract as April 7, 2001 through approximately October 22, 2001, but now seeks payment of wages and benefits through the expiration of the first option year of the contract ending March 14, 2002 (R. Br. at 10). They further argue: "The Agency is estopped from waiting until after the close of the hearing to assert that Respondents owe a wage deficiency liability through the pay period ending March 28, 2002, or five months later than Respondents were notified. Such conduct raises serious concerns regarding the issues of notice and fairness to litigants." *Ibid.* In response, DOL states:

[84] For example Larry Thompson testified that he did not supervise "residential workers" but would sometimes transport them to houses in the vicinity of D.C. properties covered by the government contract (Tr. 429-30, 434). He did not, however, identify any residential workers by name. Similarly, other workers called by Respondents at the hearing were never asked to identify "residential workers." Ventura Duarte testified that he supervised a "crew" which worked in the D.C. parks (Tr. 505). He could not remember the names of any non-Mexican employees who worked in his group and was not asked to identify any "residential workers" (Tr. 513). Manuel Duarte similarly testified that he worked as a supervisor with a group of three or four others who cut grass in D.C. parks (Tr. 516, 522-23). He did not identify any particular workers as "residential workers." Pedro Chavez, one of the H-2B workers, maintained a diary which reflects some non-contract work, but those hours were excluded from the government's calculations (Tr. 303, 305-10, DX 13B at 8; DX 13 94-95).

> Though the Respondents allege that they had no notice that the Agency was seeking back wages beyond October 6, 2001, the Agency initially alerted the Respondents to its inclusion of the entire contract period from March 2001 through March 2002 for purposes of calculating the back wages when it provided the Respondents with its first spreadsheet as part of the pre-hearing exchange between parties on December 27, 2002. Furthermore, the Respondents had the contract in their possession from the outset, which clearly provided the term of the contract. Therefore, the Respondents had clear knowledge of the period of the contract work and for which back wages may be owed. Hence, they cannot claim estoppel or that they suffered any prejudice by reliance on the Agency's pre-hearing statement.

DOL R. Br. at 27. I agree with the Agency that Respondents were clearly on notice regarding DOL's intent to seek repayment of wages and benefits for March 14, 2001 through March 14, 2002, the first option year of the contract.[85] As explained below, however, I find that the evidence of record rebuts, to some extent, the presumption that all work performed during this period was related to the D.C. contract.

> Section 4.179 of the regulations provides, in relevant part:
>
> Contractors . . . under contracts subject to the Act are required to comply with its compensation requirements throughout the period of performance on the contract and to do so with respect to all employees who in any workweek are engaged in performing work on such contracts. If such a contractor *during any workweek is not exclusively engaged in performing such contracts*, . . . it is necessary for the contractor to identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each such employee performed work on such contracts. . . .

29 C.F.R. § 4.179 (italics added).[86] The plain language of the regulation thus clearly imposes upon the contractor the burden of identifying "any workweek [during which it] is not exclusively engaged in performing . . ." contract-related work. *Ibid*. Failure to do so gives rise to a presumption that all work performed by the contractor during the period of performance is covered by the wage and benefits provisions of the Act. *Ibid*. Records required by § 4.179 must be kept for three years from the completion of work under the contract, and they must be produced for inspection and copying by authorized representatives of the Agency. 29 C.F.R. § 4.185 (2003). If the records required by the regulation are not kept for service employees performing on the contract, it is presumed that all such employees "were engaged in covered work during the period of performance." *Ibid*.

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[85] DOL Br. at 3-4. *See also* paragraph VII of the complaint filed by DOL in this case on May 1, 2002, noting the approximate dollar amount of underpayments to Respondents' workers and expressly providing: "The Secretary reserves the right to update this amount to include any additional discovered and/or occurring up to the date of the hearing."

[86] *See also* 29 C.F.R. § 4.146 (2003) ("[T]he contractor is required to comply with the provisions of the Act and regulations thereunder only while the employees are performing on the contract, *provided the contractor's records make clear the period of such performance*.") (italics added).

The purpose of these regulations is self-evident, *i.e.*, to require a contractor to maintain, and make available to Agency personnel for inspection, records which reflect: (1) when the contractor is performing work on a government contract; (2) which of its workers are performing that work; (3) how many hours of contract-related work each of those workers perform; and (4) what compensation they receive for performing such work. Without such records, the Agency cannot properly determine whether the contractor's workers are receiving the wages and benefits to which they are entitled under the wage determination applicable to the contract under which services are being provided. Thus, when a contractor fails to maintain records which identify the periods during which it is providing contract-related services, and the employees who are providing those services, it becomes the contractor's burden to overcome the presumption that all of its employees, and all of the hours worked by those employees during the contract period, are governed by the wage and benefits provisions of the contract.

According to the terms of the contract between Lawn Restoration Services and the D.C. Government, the period of performance was to run from May 31, 2000 through March 14, 2002.[87] The estimated dollar amount of the contract was $656,175.01 and required Respondents to provide services relating to grass cutting, mulching, shearing and pruning of shrubbery, and leaf removal. *Id*. at 5-7, 33-35. Work was to be performed according to a schedule provided to Respondents by Diane Quinn, the Contracting Officer's Technical Representative ("COTR"). *Id*. at 37, 45. The "deliverables" applicable to the contract were the services rendered by Respondents and were subject to alteration by Wayne Minor, the Chief Contracting Officer or his designee. *Id*. at 42, 45. Work was to commence on an unspecified date after the "post-award meeting" scheduled by the COTR, and the D.C. Government reserved the right to reschedule the performance period of the contract based on weather conditions. *Id*. at 43. The contract further provided:

> F.5.1 The Contractor(s) shall maintain an accounting system which conforms with generally accepted accounting principles which will permit an audit of all income and expenditures received or disbursed by the Contractor in the provision of services under the contract.
>
> F.5.2 The Contractor(s) shall make provisions, upon request, for inspection of financial records, including audited financial statements and tax returns, by the Contract Officer or his designee(s).

Ibid. Respondents were also required to submit to the COTR an original and four copies of a monthly invoice summary outlining expenditures, with actual invoices for the month attached. *Id*. at 44.

A review of the record evidence reveals that none of Respondents' records identified when work under the D.C. contract began or ended, nor do they identify workers performing contract-related work and workers performing non-contract-related work. Respondents' failure

[87] DX1 at 1. The contract was extended twice by the D.C. Government, once through March 14, 2002 (DX 1 at 6), and a second time for the period March 15, 2002 to March 14, 2003 (DX 40). As noted above, the Agency is only seeking payment of wages for the first year option period beginning March 14, 2001 and ending March 14, 2002 (DOL Br. at 3-4).

to maintain such records thus gives rise to the presumption that all worked performed by all employees throughout the period March 14, 2001 through March 14, 2002 is covered. The presumption may be rebutted by the introduction of "affirmative proof establishing the contrary . . . ." 29 C.F.R. § 4.179. Evidence of record which may rebut the presumption is discussed below.

Larry Thompson testified at the hearing that he was a supervisor working for Respondents in 2001 and that he went with Jeffrey Jones to pick up the H-2B workers when they arrived in Washington, D.C. (Tr. 410-12). Thompson further testified that the day after the H-2B workers arrived, he showed them some of the D.C. sites where they were going to work and at which other Lawn Restoration employees were then working (Tr. 413-14, 417). Thompson did not testify regarding when work under the D.C. contract began or ended.

Jeffrey Jones testified that the H-2B workers arrived in Washington on April 4, 2001 (Tr. 542-43). He further testified that he was laying men off in July 2001 because of a drought in the D.C. metropolitan area (Tr. 540). He stated that he was contacted the preceding month by Darnell Thompson, Chief of Facilities Maintenance for the Department of Parks and Recreation, and informed that the D.C. government was reducing by four or five the number of "cuts" required under the contract (Tr. 540-41). According to Jones, after the government's funding ceased, Lawn Restoration no longer worked for the D.C. government, and the remaining H-2B workers performed only residential work (Tr. 576-77, 579). He testified that Respondents' records showed the last day of work performed on the subject contract was September 13, 2001, as evidenced by the last invoice submitted to the D.C. government (Tr. 876, RX 63). He subsequently acknowledged, however, that Respondents submitted an invoice dated September 21, 2001 to the D.C. government (Tr. 773-774, DX 31).

Isaac Lopez Vasquez, one of the H-2B workers, gave a statement to DOL investigators that he began work for Respondents on April 4, 2001 and continued to work for them through the time of his interview on September 21, 2001 (Tr. 116). Vasquez also testified at a deposition prior to the formal hearing in this case and stated that he and the other H-2B workers "were taken to a park where there were other coworkers actually working" the day following their arrival in Washington (DX 15 at 21). According to Vasquez, they visited "a number of parks" where Respondents' employees were working. *Id*. at 22. He testified that his work consisted of "mowing lawns . . . in the parks" although he worked at Jeffrey Jones's house and Jones's sister's house on a few occasions. *Id*. at 13-15. He also testified that he did some "private" work with Larry Thompson. *Id*. at 15. With respect to when he stopped working for Respondents, Vasquez testified that he worked until "more or less" October 25, 2001. *Id*. at 11.

The diary of work maintained by Pedro Chavez shows that he worked on the D.C. contract as late as October 2001 (DX 13B). Chavez testified at a prehearing deposition that the last day he worked for Lawn Restoration was October 17, 2001 (DX 13 at 78). Some of the days Chavez worked during October were not contract-related. *Id*. at 94-95. Other H-2B workers

confirmed that Chavez kept a diary and the work hours reflected therein were similar to the hours worked by all the H-2B workers.[88]

The testimony and workers' statements introduced at the hearing thus show that Respondents' workers were engaged in contract-related work as early as April 5, 2001 (the day Larry Thompson took H-2B workers around to D.C. parks at which they would be working) and as late as October 17, 2001 (the last day that Chavez worked for Lawn Restoration).[89] Hours worked by all employees on and between those dates are thus clearly covered by the D.C. contract.

Similarly, with respect to the period prior to April 5, 2001, there was no evidence introduced by Respondents to rebut the presumption that employees were engaging in contract-related work from that date going back to the start date of the contract, *i.e.*, March 14, 2001. The payroll and time and attendance records introduced by DOL at the hearing include the pay period ending March 10, 2001.[90] DOL is therefore entitled to recover back wages or benefits for the period March 14, 2001 through April 4, 2001.

With respect to the latter part of the contract period, there is a conflict in the evidence regarding when Respondents' ceased working in the D.C. parks. Although DOL seeks recovery of back wages through March 14, 2002, the evidence shows that work under the contract stopped prior to then. The precise date upon which contract-related work stopped, however, is, as discussed below, somewhat ambiguous.

Invoices and records relating to the D.C. Government's payment of funds under the contract do not identify a precise date upon which work under the contract ended. The last invoice submitted by Lawn Restoration under the contract was dated September 21, 2001 and requested payment of $50,326.15 (DX 31 at 3).[91] However, Respondents received only $17,514.40 for work covered by that invoice, *id*. at 1-4, and the record contains no explanation concerning why the D.C. Government paid Respondents that amount instead of the $50,326.15 requested. Furthermore, although the invoice payment summary submitted by the Agency reflects contract funds with a "Starting Balance" of $246,733.00, and a "zero" balance as of September 13, 2001(DX 31 at 4), those amounts are not correct. According to a modification to the contract dated July 9, 2001, the contract amount had been increased from $246,733.00 to $293,650.00 (DX 1 at 8). Based on the payments reflected in the invoice payment summary, the actual balance of contract funds as of September 13, 2001 was $46,917.00 instead of "zero" as shown in the invoice payment summary ($293,650.00 - $246,733.00 = $46,917.00). If

[88] *See* DX 21 at 4 (statement of Luis A. Campos), 7 (statement of Agostin Chavez Carmona), 11 (statement of Romero Cotzozone), 15 (statement of Erasmo Luis Fernandez), 18 (statement of Jorge Luis Cruz Norberto), 22 (statement of Benito Murillo Vasquez).

[89] Although Vasquez testified he worked until October 25, 2001, he was equivocal on the date. Chavez's diary, in contrast, contains entries up to and including October 17, 2001.

[90] The Agency introduced at the hearing Respondents' payroll records for the pay period ending Sunday, March 10, 2001 (DX 5 at 1; DX 35 at 1) through the pay period ending Sunday, March 23, 2002 (DX 6 at 185). DOL is seeking back wages and benefits for option-year one of the contract which ran from March 14, 2001 through March 14, 2002 (DX 1 at 6).

[91] DX 31 also contains invoices from Lawn Restoration dated 4/19/2002 and 5/1/2002 but, as noted previously, DOL is not seeking back wages for any period after March 14, 2002, *i.e.*, the end of the first option year under the contract.

Respondents received $17,514.40 in payment of the September 21, 2001 invoice, as they clearly did (DX 31 at 2-3), that left $29,402.60 of contract funds available under the contract as of that date ($46,917.00 - $17,514.40 = $29,402.60).

As noted above, Pedro Chavez testified that he continued to work in the D.C. parks until October 17, 2001. Isaac Vasquez similarly confirmed that he worked in the D.C. parks until approximately October 25, 2001. The contract specified that work was to continue "through October" (DX 1 at 34) and included a number of services other than grass cutting including leaf removal at three sites from November 29 through May 31, 2001 (DX 1 at 5, 7, 33-35).

In contrast, Jones testified at a deposition before the formal hearing that the D.C. contract ended "at the end of September and the H-2B workers worked until the third week of October" (DX 32 at 160). He similarly testified at the hearing that Respondents' had completed work on the contract in late September 2001 (*See, e.g.*, Tr. 706-07, 772-77, 876). Jones's hearing testimony also notes that Respondents normally "cut until October or November" but the D.C. Government had reduced the number of cuts under the contract due to lack of rain which "took away any chance of cutting in November, and excuse me, no chance for cutting in October." (Tr. 570-71). According to Jones, he began laying off H-2B workers in late July 2001 and:

> These guys came here expecting to work until December, and I expected to work them until October or November. My hands are tied when the District government come to me and say you're not cutting in October, you're not cutting in November.

(Tr. 620). A July 28, 2001 memorandum from Jones to employees confirms that, effective July 29, 2001, he laid off ten employees, at least three of whom were non-H-2B workers (RX 39). However, on October 18, 2001, Jones issued another memorandum in which he stated that he was laying off additional employees effective October 22, 2001 "due to a reduction in the grass cutting service provided" (RX 40).

After considering the testimony and other evidence of record, I find the most probative evidence regarding when Respondents' contract-related work ceased to be the work diary kept by Pedro Ochoa Chavez and the October 18, 2001 memorandum issued by Jones.

Chavez's diary was kept contemporaneously with the work reflected therein, and it is consistent with other evidence of record. For example, Chavez testified during his deposition that he started keeping records when he began working for Respondents and his diary accurately reflected the hours he spent engaging in contract-related work (*See, e.g.*, DX 13 at 18-20, 23-24, 32-34, 37, 46, 52-53, 79). For the first few days, he recorded his time on some loose sheets of paper, and he subsequently transferred those times to the diary. *Id*. at 81-82. The last entry in the diary is dated October 18, 2001, but Chavez's last day of actual work was October 17, 2001 when he was "fired" (DX 13B, DX 13 at 78, 95). When Chavez performed non-contract work during this period, he made notations in the diary with respect to those hours (DX 13 at 93-95). Chavez's diary notes that he worked 44 hours but that he was paid for only 40 hours for the pay period ending October 20, 2001 (DX 13B). Chavez returned to Mexico on October 25, 2001 (DX 13 at 40). Consistent with Chavez's diary, Respondents' payroll records for the pay period

ending October 20, 2001 reflect that Chavez worked 40 hours that pay period, and there is no entry for him for the following pay period (DX 6 at 123, 128).[92]

Jones's memorandum dated October 18, 2001, states, in relevant part: "LRS must reduce the staff due to a reduction in the grass cutting service provided. . . . The layoff is effective 22 October 2001" (RX 40). Chavez's deposition testimony that he was "fired" on October 18, 2001 is consistent with Jones's memorandum issued the same date. Furthermore, Jones's testimony confirms that some H-2B workers continued to work until late October 2001, although Jones denied that they were then working on the D.C. contract. Jones acknowledged, as the contract shows (DX 1 at 34), that the grass cutting season for the D.C. parks and recreation centers ran through the end of October. Although he asserts that the D.C. government reduced the number of "cuts" (Tr. 571), Jones produced no documentation confirming such reduction which was expressly required by the contract (DX 1 at 43). Nor did Jones address during his testimony why, despite the reduction in the number of "cuts," employees would not have continued to work in the D.C. parks and recreation centers during October performing services required by the contract other than grass cutting, *e.g.*, collection and removal of sticks, debris and trash; mulching and maintaining flowerbeds and decorative trees; pruning shrubbery; and leaf removal (DX 1 at 5, 7, 33-35).

Looking at the evidence as a whole, I find that Jones's testimony that work on the contract ended in September is less credible than the other evidence of record. I therefore find that Respondents have failed to rebut the presumption that their employees continued to perform work under the D.C. contract up to and including the pay period ending October 20, 2001. However, I also find that the evidence affirmatively demonstrates that no work in the D.C. parks continued beyond that date. I thus find that the Agency may recover back wages and benefits for non-exempt workers employed by Respondents for the period beginning March 14, 2001 and ending October 20, 2003.

3. Wages and Benefits Paid to Employees for Contract-Related Work.

The revised Kelly spreadsheets identify the 23 H-2B[93] and 30 non-H-2B employees discussed above which I have found to be covered under the D.C. contract, and they list, *inter alia*, the hours worked by those employees during the relevant time period. These spreadsheets were compiled principally from Respondents' payroll and time and attendance records, and neither the Agency nor Respondents dispute that these workers received compensation for the hours listed therein.[94] The computations contained in the spreadsheets thus provide a valid

[92] Records for the preceding pay period similarly reflect that Chavez was paid for 73.25 hours of work (DX 6 at 114), and his diary confirms that he worked 74.25 hours but was paid for 73.25 hours (DX 13B). Other entries in Chavez' diary confirm the hours he was paid for (as reflected in Respondents' payroll records)

[93] While Jones testified that he had requested 22 H-2B workers from "Amigos" (Tr. 536), Respondents picked up 21 H-2B workers on April 4, 2001 (Tr. 411, 543-43). After the pay period ending April 21, 2001, two of these workers (Lara Rosando Espinoza and Pedro R. Hernandez) left Respondents' employ. According to Kelly's revised spreadsheets, three H-2B workers began working for Respondents during that same pay period: Jorge Luis Cruz Norberto, Jorge Luis Castro Hernandez, and Benito Morales Vasquez (Att. A).

[94] Kelly testified at the hearing that his spreadsheets also include compensation paid directly to workers by Jones which was not reflected in the payroll records prepared by Paychex and that his calculations accounted for these payments.

starting point for determining the total amount of back wages and benefits which Respondents owe. The total hours worked by the 53 covered employees during the period March 14, 2001 through October 20, 2003 reflected in the Kelly spreadsheets are:

Employee	Beginning Pay Period	Ending Pay Period	Hours Paid	Rate of Pay
1. Baxin, Gaudencio	04/06/01	09/08/01	856	$8.00
2. Bertran Camacho, Joseph I.	04/06/01	07/28/01	638	$8.00
3. Campos Aguilera, Luis Alberto	04/06/01	10/20/01	1,051.75	$8.00
4. Carmona, Augustin C.	04/06/01	07/28/01	644	$8.00
5. Castro Hernandez, Jorge Luis	04/21/01	10/20/01	1,105.5	varied[95]
6. Chacha, Romero G.	04/06/01	07/28/01	626	$8.00
7. Chavez, Pedro Ochoa	04/06/01	10/20/01	1,172.3	varied[96]
8. Cruz Norberto, Jorge Luis	04/21/01	07/28/01	620.5	$8.00
9. Espinoza, Jaime Lara	04/06/01	04/21/01	74.5	$8.00
10. Espinoza, Rosando Lara	04/06/01	06/02/01	293.75	$8.00
11. Fernandez Roman, Erasmo L.	04/06/01	07/28/01	596.25	$8.00
12. Gutierrez, Rosando M.	04/06/01	10/20/01	1,036.25	$8.00
13. Herrera, Bertin Morales	04/06/01	06/30/01	397.5	varied[97]
14. Mendoza, Manuel Vichi	04/06/01	07/28/01	570.75	$8.00
15. Morteo, Juan Hernandez	04/06/01	10/20/01	1,059.5	$8.00
16. Nolasco Fernandez, Jose Luis	04/06/01	07/28/01	621.25	$8.00
17. Rebolleda Hernandez, Pedro[98]	04/06/01	04/21/01	67	$8.00
18. Sanchez Gutierrez, Jose Manuel	04/06/01	06/30/01	401	$8.00
19. Toga, Rosalino D.	04/06/01	07/28/01	533.75	$8.00

[95] $8.00 for the pay periods from 4/21/01 through 6/16/01; $8.50 for the pay periods 6/30/01 through 7/14/01; $9.25 for the pay periods 8/25/01 through 10/20/01.

[96] $8.00 for the pay periods 4/21/01 through 8/11/01; $8.50 from the pay periods 8/25/01 through 10/20/01.

[97] $8.00 for the pay periods 4/21/01 through 5/5/01; $8.25 for the pay periods 5/19/01 through 6/30/01.

[98] This is the same employee identified elsewhere in the record as, *inter alia*, "Pedro R. Hernandez." The Agency's opening brief notes that Pedro R. Hernandez "only worked one or two pay periods [for Respondents] and no rent was deducted from [his] wages." DOL Br. at 48, n 21. Similarly, the Agency states that "Pedro Hernandez Rebolleda" was one of three H-2B workers who were no longer employed by Respondents in June 2001 (DOL Br. at 49, n 22). Respondents' time and attendance summary sheet and sign-in sheets for the pay period ending April 21, 2001 reflect 67 hours worked by Hernandez (DX 8 at 0436-0469), although the corresponding payroll records do not show that any wages were paid to this employee (DX 5 at 10-31). The 67 hours noted in the time and attendance summary and sign-in sheets is consistent with the total hours worked by the employee identified by DOL as a non-H-2B worker in the revised Kelly spreadsheets at page 18. There were some payroll checks issued directly by Jones to, among other employees, Hernandez, (*see* TR. 791 and RX 41 at 1179 - check #3872 for $412.43) and, according to Jeffrey Jones, Hernandez was one of three H-2B workers suspended in April 25, 2001 for taking a lunch break at a time which was not authorized (Tr. 560, RX 35 at 1204). The disciplinary notice reflecting the employee's suspension bears a handwritten note which states: "Mr. Hernandez was being explained [sic] why he was being suspended. He didn't like the action that was taken so he decided to quit." (RX 35 at 1204). Based on the foregoing, I find that Pedro R. Hernandez worked a total of 67 hours performing services under the contract and that he is therefore entitled to compensation consistent with the wages and benefits provisions contained therein. I further find that Hernandez received from Respondents compensation totaling only $412.43 prior to April 25, 2001, the date of his resignation. Hernandez is therefore entitled to compensation for 67 hours at the rate specified in the contract for wages minus the compensation received.

Employee	Beginning Pay Period	Ending Pay Period	Hours Paid	Rate of Pay
20. Vasquez, Benito Morales	04/21/01	08/25/01	768.5	$8.00
21. Vasquez, Isaac L.	04/06/01	10/20/01	1,026.25	$8.00
22. Xolo, Abraham G.	04/06/01	07/28/01	586.25	$8.00
23. Zaraleta, Claudio Blas	04/06/01	10/20/01	1,076.5	varied[99]
24. Romero, Alcides	07/14/01	07/28/01	92	$6.60[100]
25. Baker, Hoyt	09/22/01	10/06/01	58.25	$8.00[101]
26. Ball, Larry	04/07/01	08/11/01	578	$9.05
27. Battle, Don C.	04/07/01	04/21/01	101.5	$10.00
28. Berganza, Maynor	04/07/01	05/19/01	280.5	varied[102]
29. Bowie, Chris	07/28/01	07/28/01	30	no payments[103]
30. Carey, Delnar	09/22/01	10/06/01	87.75	$8.00[104]
31. Duarte, Manuel A.	04/07/01	10/20/01	1,209.5	varied[105]
32. Duarte, Ventura	04/07/01	10/20/01	607.75	varied[106]
33. Evans, Ronald	09/22/01	10/06/01	88.75	$8.00
34. Fields, Thomas	03/24/01	10/20/01	1,192.25	varied[107]
35. Garcia, Haroldo	04/07/01	08/11/01	777.75	$8.00
36. Hargrove, Calvin C.	04/07/01	10/20/01	888	$9.05
37. Hernandez, Jose Aceve	04/07/01	04/21/01	106.5	$9.05
38. Jackson, Devin	09/22/01	09/22/01	16	no record[108]
39. Johnson, Kenneth	05/05/01	07/14/01	213	varied[109]
40. Jones, Dwayne Lewis	05/05/01	06/30/01	234.75	$8.00

[99] $8.00 for the pay periods from 4/21/01 through 6/11/01; $8.50 for the pay periods from 6/30/01 through 7/14/01; $9.00 for the pay periods from 7/28/01 through 10/20/01.

[100] As noted above, although Respondents' payroll records do not list any individual by this name, Respondents' time and attendance records for these two pay periods list "Alcides Romero" as having worked the hours noted in the Kelly spreadsheets (DX 11 at 0667, 0723). Kelly testified that checks were signed by Jones (versus being generated by Paychex) with respect to these two pay periods (Tr. 354-55). Two checks were issued to Alcides Romero on 7/28/01: one for $415.02 and the other for $190.00. The approximate hourly rate indicated above is calculated by dividing the total sum of these payments by the number of hours worked by Alcides Romero.

[101] $8.00 for the pay periods from 9/22/01 through 10/06/01.

[102] $9.00 for the 4/07/01 pay period; $10.50 for all the other pay periods.

[103] Kelly testified that checks were signed by Jones (versus being generated by Paychex) with respect to this pay period (Tr. 354-55). However, Respondents did not offer into evidence any checks issued to this employee, as they did for other workers (RX 41 at 1185). Accordingly, DOL correctly concluded that Respondents owe back wages and benefits for all his hours worked (Att. A).

[104] Respondents' payroll records do not specify any payments for the 10/6/01 pay period (DX 6). Thus, DOL correctly concluded that Respondents owe back wages for all his hours worked during this pay period (Att. A).

[105] $9.50 for the pay periods from 4/07/01 through 5/5/01; $9.65 for the pay periods from 5/19/01 through 10/20/01.

[106] $9.05 for the pay periods from 4/21/01 through 5/5//01; $9.30 from 5/19/01 through 7/14/01; $8.00 for the pay periods from 10/06/01 through 10/20/01.

[107] $10.50 for the pay periods 3/24/01 through 4/7/01; $14.25 for the pay periods from 4/21/01 through 10/20/01.

[108] This is one of several employees whose names are reflected on time and attendance records and not payroll records (DX 12; DX 6). Because Respondents offered no evidence of payments made to this employee, DOL correctly concluded that he must be compensate for all his hours worked (Att. A).

[109] $10.00 for the 6/2/01 pay period; $8.50 for the pay periods from 6/16/01 through 7/14/01.

Employee	Beginning Pay Period	Ending Pay Period	Hours Paid	Rate of Pay
41. Jones, Kevin M.	04/07/01	06/16/01	340.25	$12.50
42. Juarez, Jose L.	04/07/01	05/19/01	237.75	$8.00
43. Mahoney, Clarence	09/22/01	10/20/01	198.25	$8.00
44. Monroy, Perfecto	04/07/01	07/28/01	320.25	$9.05
45. Morales, Carlos A.	04/07/01	05/19/01	231.5	$9.05
46. Morales, Jaime	04/07/01	06/30/01	541.5	varied[110]
47. Orellana, Antonion	04/07/01	04/07/01	27.5	$8.00
48. Perez, Mario	04/07/01	05/19/01	241.5	$8.50
49. Romero, Jose L.	04/07/01	05/19/01	250	$8.00
50. Strod, Jerome	07/14/01	07/28/01	116	$9.00
51. Thompson, Larry	04/07/01	10/20/01	1,219.5	varied[111]
52. Vasquez, Jose H.	04/07/01	04/21/01	105	$9.05
53. Williams, Michael	07/14/01	09/08/01	331.5	$10.00

(DX 5, 6).

4. Back Wages and Benefits Owed to Covered Employees.

The Agency seeks to recover, as back wages, the difference between compensation actually paid to the above-identified employees and the prevailing minimum wage under the applicable wage determination, to the extent that such minimum wage exceeds the employees' actual compensation rate. DOL also seeks recovery of underpayments in overtime and holiday pay, health and welfare benefits, and compensation for time allegedly worked by employees which are not reflected in Respondents' payroll records. Each of these items is discussed below.

a) Health and Welfare Benefits.

In my order granting partial summary judgment, I previously determined that Respondents failed to pay health and welfare benefits required by the applicable wage determination to any of employees. The contract required payment of health and welfare benefits amounting to $1.63 per hour for each covered employee up to a maximum of 40 hours per week. Respondents have failed to introduce any evidence that such benefits were paid to any of their employees, and they are therefore liable for $1.63 for each hour worked by non-exempt employees, up to a maximum of 40 hours per employee per week, during the period March 14, 2001 through October 20, 2003. The computations in the Kelly spreadsheets accurately reflect the amounts due for such benefits with the exception of the following workers: Rosando Gutierrez, Manuel Duarte, Ventura Duarte, Thomas Fields, Clarence Mahoney, Jerome Strod, Larry Thompson, and Michael Williams. Calculations for these workers improperly include hours worked after October 20, 2001, which I have previously determined to be the last day covered by the contract. The Agency also failed to calculate fringe benefits due to Thomas Fields for the pay period ending March 24, 2001 (the revised Kelly spreadsheets reflect a zero in

[110] $8.00 for the pay periods from 4/25/01 through 5/5/01; $8.25 for the pay periods from 5/19/01 through 6/30/01.
[111] $9.25 for the 4/7/01 pay period; $10.50 for the pay periods 4/21/01 through 10/20/01.

the corresponding column, while there is no evidence that Fields was paid fringe benefits for that period) (Att. A. at 15, Column R). Finally, Pedro R. Hernandez is entitled to health and welfare benefits consistent with my previous finding that he worked 67 hours performing services under the D.C. contract.

b) Overtime Pay.

With respect to back wages owed for overtime pay, Respondents had a policy in place during the relevant time period by which they paid overtime compensation at the rate of one and one-half times an employee's regular compensation rate for any hours worked over 80 hours during a two-week period (Tr. 805). However, the CWHSSA requires that all laborers and mechanics be paid not less than one and one-half times the basic rate for all hours worked in excess of 40 hours during any workweek. 40 U.S.C. § 328(a); 20 C.F.R. § 5.5(c)(1) (2003).[112] The manner in which Respondents' paid overtime thus resulted in some employees not receiving overtime compensation to which they were entitled.[113] In addition, since Respondents were not paying their workers compensation at the rate established by the applicable wage determination, any computations with respect to overtime pay were necessarily flawed. Furthermore, as discussed below, Respondents failed to accurately record all hours worked by their employees under the contract, leading to other inaccuracies in overtime payments. Accordingly, Respondents' employees are entitled to recover back wages for any such overtime underpayments for the period from March 14, 2001 through October 20, 2001. However, the back wages for overtime calculated by DOL must be corrected to the extent that the Agency used inaccurate wage figures for certain pay periods for the following employees: Hoyt Baker, Manuel Duarte, Calvin Hargrove, and Thomas Fields. These miscalculations are discussed in a separate subsection below. I also find that the Agency's calculations erroneously credited one hour of overtime compensation to Pedro R. Hernandez, who, according to Respondents' time and attendance records, did not perform any overtime work (DX 8 at 436; Att. A at 18).

c) Holiday Pay.

In its post-hearing brief, DOL alleges that Respondents failed to provide holiday compensation to their employees for the Memorial Day, Labor Day, and Independence Day holidays (DOL Br. at 29).[114] Under 29 C.F.R. § 4.174, a contractor must provide holiday pay to its employees based on the applicable wage determination. The wage determination applicable to the D.C. contract required Respondents to provide pay for at least the following ten holidays: New Years Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day,

[112] It is irrelevant that Respondents paid their employees every two weeks instead of weekly. The CWHSSA and applicable regulations require employers to total all hours worked by an employee pursuant to the contract in each workweek even though the employees are paid on a bi-weekly basis. *See In the Matter of Hugo Reforestation, Inc. and Hugo Peregrino*, ARB No. 99-003, ALJ No. 1997-SCA-20, slip op. at 6 (ARB Apr. 30, 2001) (improper for employer to pay employee who worked 48 hours in first workweek and 32 hours in second workweek at standard rate for all hours).

[113] One example of such underpayments, noted in the Agency's brief (DOL Br. at 26), is Jorge Luis Castro Hernandez who worked 41.5 hours during the first week of the pay period ending August 11, 2001 but received no overtime compensation because he worked less than 80 hours during the two-week pay period.

[114] All three holidays fall within the period from March 14, 2001 to October 20, 2001, which I have previously determined to be covered by the D.C. contract.

Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day (DX 2 at 90). Under the applicable regulation, a full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours. *See* 29 C.F.R. § 4.174(c)(1).

The evidence of record establishes that Respondents did not pay any employees for Memorial Day and Labor Day (DX 5 at 51-55; DX 6 at 99-100; DX 9 at 558-61; DX 12 at 774-75). In addition, a comparison of Lawn Restoration's sign-in sheets with its payroll records reveals that Respondents also failed to pay those workers who did not work on Independence Day (DX 5 at 72-75; DX 11 at 664-67). While both the regulation and the applicable wage determination allowed Respondents to "substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved," Respondents offered no evidence that they provided such alternative days off (DX 2 at 90). 29 C.F.R. § 4.174(a)(3). Accordingly, Respondents owe their employees back wages for these holidays.

In addition, Respondents failed to adequately compensate employees that performed work on the D.C. contract on Independence Day (DX 5 at 72-75; DX 11 at 664-68). The relevant regulation provides that "[u]nless a different standard is used in the wage determination, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours or be furnished another day off with pay." 29 C.F.R. § 4.174(c)(2). Respondents' payroll journal and time and attendance records establish that several employees worked on Independence Day (DX 5 at 72-75; DX 11 at 664-68). Also, the sign-in sheet for July 4, 2001 contains both the sign-in and sign-out times for the employees and a note addressed to Jones, stating that the "men say they worked 12 hrs" (DX 11 at 668). In addition, Chavez's diary reflects nine hours of work on July 4, 2001, and both Pedro Chavez and Isaac Vasquez testified that they worked on that day with the understanding that they would be paid at time and a half (DX 13B at 5; DX 13 at 91; DX 15 at 47-48). Respondents' payroll records indicate that the employees that worked on Independence Day were paid at their regular rates and did not receive "the cash equivalent of a full-day's pay up to 8 hours." 29 C.F.R. § 4.174(c)(2). Nor did Respondents present any evidence to show that they provided alternative days off in lieu of this holiday, as permitted by the regulation and the applicable wage determination. *Ibid.*; DX 2 at 90.[115]

d) Uncompensated Pre-Shift Activities.

The courts rely on the FLSA to determine whether the time worked by employees is compensable under the SCA. 29 C.F.R. § 4.178; *see generally In re Lucy E. Enobakhare,* 95-99 CCH-WH ¶32,534 (1996). The pre- and post-shift time is compensable only if the employees are "required to be on the employer's premises, on duty or at a prescribed workplace." *See Mt. Clemens Pottery Co.*, 328 U.S. at 690-91, *superseded by statute on other grounds as stated in*

[115] Respondents claim that when salaried employees Thomas Fields, Kevin Jones, and Larry Thompson worked on holidays, they were permitted to earn compensatory time (R. Br. at 18). To support this claim, Respondents point to notations in the payroll record indicating that Fields and Jones used some of their compensatory time in early May, 2001 (RX 45 at 514). However, Respondents did not present any evidence showing that this time was given as a compensation for the holiday work or was offered pursuant to "a plan communicated to the employees," as required by the regulation and the applicable wage determination (DX 2 at 90). 29 C.F.R. § 4.174(a)(3).

Carter v. Panama Canal Co., 463 F.2d 1289, 1293 (D.C. Cir. 1972); *see also* 29 C.F.R. § 4.178. By contrast, activities voluntarily undertaken by the employees for their own convenience are not compensable. *See U.S. Dep't of Labor v. J.N. Moser Trucking*, 99-02 CCH-WH ¶33,049 (2000).

In this case, the pre-shift and post-shift activities of workers included travel time from the shop to the work sites and back, and time spent loading and unloading equipment (Tr.116 -17, 422-23, 457, 517, 519-20, 572-73, DX 19). However, because the evidence of record does not allow for a reliable estimate of post-shift hours, only the pre-shift hours will be considered.[116] Under the applicable law, an employer must compensate its employees for the time spent loading equipment. The Supreme Court has held that pre-shift activities performed upon arriving at the workplace, such as preparing equipment, are compensable. *Mt. Clemens Pottery Co*., 328 U.S. at 693; *see also U.S. Dep't of Labor v. Cole Enters.*, 62 F.3d 775 (6th Cir. 1995) (holding that compensable hours include pre-shift work performed by waiters and waitresses who prepared the dining room before their shift and cleaned up and put away equipment after their shift); *Amos v. United States*, 13 Cl. Ct. 442 (1987) (holding that time spent picking up equipment at the beginning of a shift and returning it at the end of a shift is compensable).[117]

The evidence convincingly establishes that Respondents required the workers to load equipment prior to their shifts and unload it at the end of the day, but did not compensate employees for the time spent on these activities. A memorandum dated July 3, 2001 informed Respondents' workers that, beginning July 5, 2001, they were required to sign in daily at 6:00 a.m. at which time the clock would run for only 15 minutes (until 6:15 a.m.) while equipment was loaded on the trucks and would not resume running until the crews reached their assigned work sites (DX 18). Although Jones testified that Respondents did not create this memorandum (and that he never saw it before the complaint was filed by DOL), abundant evidence establishes that Jones either authorized its creation or was its author (Tr. 582-84). While it does not contain Jones's signature, the text of the July 3rd memorandum is followed by a typed name and title, *i.e.*, "J. Jones LRS Pres" (DX 18). Respondents had a practice of issuing memoranda to their workers (RX 39, 40), and the contents of the memorandum make it clear that its author had first-hand knowledge of Respondents' business operations. Jones's assertion that the memorandum is not consistent with the standard format used by Respondents (Tr. 582-84) is unconvincing since Respondents did not always use the same format for memoranda acknowledged by them to be Respondents' records. *Ibid.* [118] Also, when Investigator Zylstra questioned Jones during their final conference about the change in policy reflected in the memorandum, Jones not only did not deny the existence of the memorandum, but he acknowledged the change in policy and explained that it was meant to deter inefficient use of time by the workers while loading equipment (DX 19

[116] DOL acknowledged that it is impossible to make a reliable estimate of the post-shift hours, because Respondents' sign-in sheets did not reflect "site out" or "shop in" times at the end of the day (DOL Br. at 43).

[117] B*ut see In re Pollution Control Constr. Co., Lisbon Contractors, Inc*., 1990 WL 484313 (DOL Wage Appeal Board) (holding that no compensation was required where pipelayers loaded and unloaded equipment in order to be allowed to use employer's trucks for their personal purposes). As DOL correctly points out, this case is distinguishable because Respondents' workers "were not exchanging their service for a personal benefit" (DOL Br. at 37).

[118] Jones further undermined his own credibility when he testified that "I don't hand out memos to employees at all," but later acknowledged that the contrary is true (RX 39, 40).

at 115).[119] Furthermore, the testimony and statements made by Respondents' employees confirm that the policy set forth in the July 3rd memorandum was in fact implemented. In particular, Pedro Chavez, Isaac Vasquez, and seven other H-2B employees interviewed by DOL stated that they loaded and unloaded equipment at Respondents' warehouse and confirmed the change in policy reflected in the memorandum (DX 13 at 23-28; DX 15 at 26-28; DX 21 at 4, 7, 10, 14-15, 18, and 21-22).[120] Indeed, Pedro Chavez testified that he changed his method of recording work hours in his diary as a result of Respondents' change in their timekeeping policy, and his diary reflects this change (DX 13 at 23-28, 51).[121] Furthermore, starting on July 18, 2001, Respondents' sign-in sheets were changed to reflect "site in" and "shop in" times, consistent with the new policy described in the memorandum (RX 50 at 736-48). Finally, Jones admitted that workers had to load equipment on the trucks when he described their morning routine as follows: "[y]ou get in your truck, if your weed eater is on another truck or whatever, you move that, put it on the other one, and then they'll proceed to their first site" (Tr. 761).

The time spent by Respondents' employees traveling from the warehouse to their first worksites was also compensable. The determination of compensability under the FLSA is governed by the Portal to Portal Act, 29 U.S.C. § 251 *et seq*., which was amended by the Employee Commuting Flexibility Act of 1996. Under this amendment, employers are not required to compensate travel from home to work if it is "a normal incident of employment." 29 C.F.R. § 785.35; *see also* 29 U.S.C. § 254(a). By contrast, travel is compensable if it is an integral part of employment. *See Herman v. Rich Kramer Constr., Inc.*, 163 F.2d 602 (8th Cir. 1998) (holding that travel time from employer's office at the beginning of the workday and returning to the office at the end of the workday is compensable); *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109 (10th Cir. 1999) (holding that the time that drivers spent traveling on city shuttles to and from relief points at beginning and end of their split shift periods was compensable); *Baker v. Barnard Constr. Co*., 146 F.3d 1214 (10th Cir. 1998) (holding that employees' return travel time associated with refueling and restocking welding rigs in the evenings was compensable as an integral and indispensable part of principal activities for which they were hired); *Sec'y of Labor v. E.R. Field, Inc*., 495 F.2d 749 (1st Cir. 1974) (travel time for return trip to employer's shop at the end of the workday is compensable). Thus, if an employee is required to report to a meeting place to pick up equipment or to receive instructions, the travel time from such designated place to the first worksite is compensable. *See* 29 C.F.R. § 785.38.

[119] Jones also acknowledged that while DOL's search of his computers in January 2003 did not uncover the July 3, 2001 memorandum, he had a practice at the start of every new year of deleting documents from the prior year from his computer (Tr. 869).

[120] Six H-2B employees indicated that they were required to load equipment, including trimmers, blowers, "36"s, "42"s, weed eater, blowers, rakes and shovels. *Ibid.* Thus, Thompson's testimony that the workers did not have to load equipment is not credible (Tr. 422-23). Also, six employees stated that in July, 2001, Respondents implemented a new system for calculating hours worked, and the seventh employee stated that he was only paid for 15 minutes for loading and unloading equipment. *Ibid.* The employees also indicated that the time clock would not start running until they arrived at the first worksite and would stop running when they left the last worksite. *Ibid.*

[121] He explained that initially he recorded only the time when he arrived at the Respondents' shop, but after the change in policy he added a column that reflected the time he arrived at the parks (DX 13 at 19-20, 33; DX 13B).

As noted above, Respondents' July 3rd memorandum clearly required that the workers report to the warehouse prior to going to the worksites[122] and the employees' statements indicate that they did so on a daily basis (DX 18; DX 13 at 25-26, 35-36; DX 15 at 14, 15-17, and 24; DX 21 at 3, 10, 14, 18, and 21-22).[123] Also, supervisor Larry Thompson testified that Respondents' foreman, Thomas Fields, gave out a list of work sites to each crew in the morning at the warehouse (Tr. 423). In addition, Pedro Chavez testified, and Respondents acknowledged, that the workers were sometimes re-assigned by the supervisors in the morning from one crew to another (DX 13 at 35-36; R Br. at 17). In fact, Jones admitted that the workers were required to report to the warehouse when he testified that the designation "site in" on the sign-in sheets represents the time when the workers were required to report to the warehouse (Tr. 863). He also stated that the "site in" notation represented "[t]he time your day starts . . . [w]hen they arrived at the shop to leave to go to their first site . . . You come to the shop, you sign in . . . ." (Tr. 761). In light of this evidence, Respondents' claim that the H-2B workers were not required to report to the warehouse in the morning and did so only to secure free transportation to and from work is not credible (Tr. at 566-67, 761).

In calculating back wages for pre-shift activities, the Agency estimated that the workers spent one hour every workday loading equipment on the trucks and traveling to the work sites (Att. A). I find that this estimate is reasonable and substantiated by the evidence of record. The Agency calculated back wages for pre-shift work starting only with the pay period ending July 28, 2001, when Respondents changed the format of the sign-in sheets to reflect "shop in" and "site in" times (Tr. 317-18; Att. A.; RX 50 at 736). Kelly testified that on most days the time difference between the "shop in" and "site in" time appeared to be one hour (Tr. 317-19). In addition, Pedro Chavez testified that loading the equipment took approximately 20-30 minutes, and that travel to the sites took approximately one hour (DX 13 at 24-25). Kelly testified that, contrary to the July 3rd memorandum, Respondents paid their workers only from the "site in" time to the end of the day, minus one hour for lunch (without adding 15 minutes for loading and unloading equipment) (Tr. 319). Accordingly, DOL rightfully added one hour to each worker's total daily hours, with the exception of Pedro Chavez whose back wages were calculated based solely on the hours noted in his diary (Tr. 320-21; Att A).

e) Other Uncompensated Time.

As noted above, I have already found in my order granting the Agency's motion for partial summary judgment that Respondents improperly deducted one-half hour for two fifteen minute breaks from the daily total of hours worked by employees performing work under the contract. Jeffrey Jones acknowledged that it was Lawn Restoration's policy in 2001 to deduct one hour per day for a one-half hour lunch break and two separate 15 minute breaks (Tr. 856-8). For purposes of the SCA, the "[d]etermination of hours worked will be made is accordance with

[122] The memorandum stated, in part: "[e]ffective 7/5/01 the report time will stay at 6:00 am. All employees must sign in at 6:00 am with Mr. Fields . . . . On 7/5/01 LRS will start the clock at 6:00 am until 6:15 am to load all equipment on all trucks. The clock will restart when trucks arrive at the work site . . . At the end of the day each truck will return to the shop and clean all equipment receiving 15 minutes and signing out" (DX 18)

[123] For example, H-2B employee Luis Campos stated that "in the morning a supervisor picks me up along with my other co-workers and takes us to the main office. From here we load the tools, lawn mowers in a truck, then we go to the gas station and fill up from 3 to 4 gas containers and then to the first work site" (DX 21 at 3). Other employees' made similar statements (DX 21).

the principles applied under the Fair Labor Standards Act ["FLSA"] as set forth in part 785 of this title." 29 C.F.R. § 4.178. Thus, a non-compensable bona fide meal break must consist of 30 or more minutes and afford an employee a complete relief from his or her duties. 29 C.F.R. § 785.19. By contrast, a period of 15 minutes must be counted towards hours worked. 29 C.F.R. § 785.18. Thus, in computing back wages owed to employees, DOL properly added to each employee's daily hours thirty minutes for two 15 minute breaks improperly deducted by Respondents (Att. A).

In addition, Respondents improperly failed to compensate H-2B employees for the hours worked on April 5th and 6th, 2001. In particular, Respondents failed to pay their employees for the time spent in processing, training, and orientation on April 5, 2001. Jeffrey Jones acknowledged that on Thursday, April 5, 2001, the 21 H-2B employees were transported to the warehouse and asked to fill out employment applications, I-9 forms, and tax forms (Tr. 545-46). These workers were also issued uniforms and safety equipment (Tr. 548-49). According to Jones this "processing" took approximately one and one-half to two and one-half hours (Tr. 545-46, 548-49). Respondents further assert that no employment relationship existed between Respondents and the H-2B workers at the time of "processing," because the H-2B workers were mere "prospective employees" that were being considered for employment (*e.g.*, Respondents were free to reject any H-2B workers that failed to present a valid passport or visa). However, under the FLSA,[124] the courts do not require proof of a contract of employment to establish an employment relationship. *See Walling v. Sanders*, 136 F.2d 78, 81 (6th Cir. 1945). Thus, DOL is correct in stating that "Respondents' actions on April 5th, in light of their prior contacts with Amigos to recruit 22 Mexican workers and their submission of a labor certification application for H-2B employees, establish that the H-2B employees were 'employed' by Respondents at the time they were brought to the Respondents' warehouse for processing and training." (DOL Br. at 13). Furthermore, the FLSA defines the term "employ" broadly as "to suffer or permit to work," and the courts have held that "all the time during which an employee is necessarily required to be on the employer's premises" is compensable. 29 U.S.C. § 203(g); *see also* 29 C.F.R. § 785.6; *Mt. Clemens Pottery Co.*, 328 U.S. at 690-91. Therefore, under the facts of this case, the time spent by the H-2B workers in "processing" is compensable.

As stated above, the courts look to the FLSA to determine the number of hours worked for the purposes of the SCA. *See* 29 C.F.R. § 4.178; *see generally In re Lucy E. Enobakhare*, 95-99 CCH-WH at ¶32,534. Under the relevant provisions, training need not be compensated only when (a) attendance is outside the employees' regular work hours, (b) attendance is voluntary, (c) the training is not directly related to the employees' work, and (d) the employees do not perform productive work during training. *See* 29 C.F.R. § 785.27. Several H-2B employees have stated that they received training on April 5th (DX 13 at 29; DX 15 at 19-21; DX 21 at 3, 10).[125] In particular, Pedro Chavez and Isaac Vasquez testified that the workers were shown training videos that contained instructions on the proper use of weed eaters, and Vasquez stated

[124] As noted above, the FLSA governs the determination of the number of hours worked for purposes of the SCA. *See* 29 C.F.R. § 4.178.

[125] Romero Coatzozon stated that on the first day Respondents conducted unpaid training at the main office (Tr. 184, DX 21). Fernandez and Norberto made no mention of training, but referenced Chavez's diary (which does mention training) as an accurate reflection of their hours (Tr. 185, DX 21). Benito Vasquez stated that his first two days of work were training and not paid for. *Ibid.*

that Jones also gave instructions to the workers on the importance of cleaning the work site prior to cutting grass (DX 13 at 29; DX 15 at 19-21).[126] The statements of other H-2B employees corroborated this testimony (DX 21 at 3, 10). Furthermore, Larry Thompson testified that he offered the video to the H-2B workers (Tr. 414). Thomson also testified that he subsequently took H-2B workers on a tour of D.C. parks where they would be working, and the statements of Pedro Chavez and Isaac Vasquez confirm this testimony (Tr. at 455-56; DX 13 at 30-31; DX 15 at 21). Even though Jones testified that he did not authorize such a tour, Thomson testified that he informed Jones over the radio that he was taking the workers on a tour (Tr. 417). Therefore, the tour took place with Jones's knowledge and acquiescence, and thus was implicitly authorized by Respondents. *See Munbower v. Calcicott*, 526 F.2d 1183, 1188; *Davis v. Food Lion*, 792 F.2d 1274 (4th Cir. 1986). Similarly, where an employer is aware of its employees' activities, but does not express disapproval or order them to stop, such activities are compensable. *See Calcicott*, 526 F.2d at 1188.

The evidence of record is sufficient to make a reliable estimate of the time spent by the H-2B employees on training and other work-related activities on April 5, 2001.[127] Luis Campos indicated that he and 20 other employees received training from 6 a.m. until 1 p.m., and Pedro Chavez's deposition statement corroborates this assertion (Tr. 183; DX 21 at 3, 13 at 31).[128] Furthermore, Isaac Vasquez also testified that the workers were picked up at around 5 a.m. and spent approximately six hours on all the aforementioned activities (DX 15 at 21-22). Accordingly, 21 H-2B workers should be awarded $58.82 each in back wages for the 6.5 hours worked on April 5, 2001.[129]

With regard to April 6, 2001, the evidence establishes that 21 H-2B employees worked on that day, but only two of these employees were compensated for their work. Respondents' sign-in sheets indicate that the H-2B employees worked from 6 a.m. until 2 p.m. on April 6th, and payroll records do not reflect any compensation for that day during the pay period ending Sunday, April 7, 2001 (RX 42 at 429-31; DX 5 at 10-16). Respondents claim that only two H-2B employees, Jose Sanchez Gutierrez and Bertin Morales Herrera, worked on that day and were paid for their work with personal checks (R. Br. 31-32; RX 41 at 1177, 1181; RX 43 at 436). Jones testified that the other employees reported to the warehouse on April 6th only to be assigned their equipment, and that the employees' signatures on the sign in sheet for that day represent receipt of assigned weed eaters (R Br. at 33; Tr. 820-22). However, Respondents' sign-in sheet for April 6, 2001 makes no reference to equipment and reflects a full eight-hour

[126] In fact, Jones acknowledged that only two workers had indicated that they knew how to use weed eaters and were assigned to work on April 5th (Tr. 821-22, 845).

[127] Respondents argue that the Agency improperly relied on the testimony of a small percentage of their employees to reconstruct the hours worked by all employees (R Br. at 29-30). However, this claim is misplaced since the testimony of a representative sample of employees can establish a uniform pattern or practice of back wages owed for all employees as a matter of "just and reasonable inference." *See Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83 (10th Cir. 1983). It is not required that the majority of the employees testify, as long as the testimony presented supports the reasonable estimate of hours worked by all employees. *See Donovan v. New Floridian Hotel*, 676 F.2d 468, 472 (11th Cir. 1982) (awarding back wages to 207 employees based on the testimony of only 23).

[128] While Jones testified that the training video was only seven- to ten-minutes long, Vasquez and Chavez indicated that the video demonstration took approximately two hours (Tr. 546-47; DX 13 at 30; DX 15 at 19). However, this disagreement is immaterial in light of the aforementioned substantial evidence that the workers spent a total of 6.5 hours performing job-related activities on April 5, 2001.

[129] From 6 a.m. until 1 p.m., minus one half hour for lunch.

day: from the 6 a.m. sign-in time to the 2 p.m. sign-out time (RX 42 at 429-31). This evidence is corroborated by Chavez's diary which also reflects eight hours of work for that day (DX 13B). Furthermore, even if the workers did not perform any lawn maintenance work on that day, and instead had to spend this entire time at the warehouse obtaining equipment, this time (including any waiting time) would still be compensable. *See Mt. Clemens,* 328 at 690-91; *Amos v. United States,* 13 Cl. Ct. at 449. Accordingly, the Agency correctly concluded that Respondents' employees are owed back wages for 7.5 hours for the work performed on that day.

Finally, several employees have stated that Respondents failed to pay them for all hours worked after April 6, 2001 (DX 13 at 75-76, 85-88, and 105-06; DX 15 at 17; and DX 21 at 15, 18 and 22). In fact, Jones acknowledged that on June 11, 2001, he imposed a three-day suspension on ten workers who refused to board the truck in the morning until their complaints about unpaid hours were resolved (Tr. 562). Nevertheless, DOL "acknowledges that it is impossible to reasonably estimate the hours worked by those employees" with the exception of Pedro Chavez (DOL Br. at 41, n.17).

With respect to Chavez, DOL asserts, and I agree, that it is possible to accurately estimate the total number of uncompensated hours worked by this employee. As noted above, Chavez maintained a thorough and contemporaneous diary of all his work hours, which is consistent with other evidence of record (DX 13 at 17-18; DX 13B). On this basis, I have previously found that Chavez's diary accurately reflected the hours he spent engaging in contract-related work (*See, e.g.,* DX 13 at 18-20, 23-24, 32-34, 37, 46, 52-53, 79). The diary reflects several discrepancies between the number of hours worked by this employee and the number of hours paid according to Respondents' payroll records.[130] Pedro Chavez asserted that he complained to Respondents on several occasions about uncompensated hours (DX 13 at 75-76, 85-88, and 105-06). However, he was compensated for only one of several underpayments (Tr. 669). Thus, I find that DOL appropriately based its calculations of back wages due to Pedro Chavez on the work hours reflected in his diary (Att. A).

f) Miscalculations in the Revised Kelly Spreadsheets

The back wage computations in the revised Kelly spreadsheets are based on appropriate wage rates,[131] with the following exceptions. For Hoyt Baker, Kelly incorrectly used an hourly rate of $9.25, while the correct rate for this employee is the minimum wage of $9.05, given the fact that he was paid $8.00 per hour the entire time he was employed by Respondents. For Manuel Duarte, Kelly erroneously used $9.30 for the pay periods from 5/19/01 through 6/02/01, while the appropriate rate is $9.65. Similarly, for Thomas Fields, Kelly used a rate of $14.25 for all pay periods, while $10.50 was the appropriate rate for the pay periods from 3/26/01 through 4/12/01. Also, for Calvin Hargrove, Kelly used a rate of $9.05 for the pay period ending 4/7/01, while Respondents' payroll records reflect a rate of $9.50 for this pay period (DX 5 at 10). The Agency also erroneously indicated that no back wages are owed to Devin Jackson (Att. A at

[130] For example, Chavez' diary notes that he worked 44 hours but that he was paid for only 40 hours for the pay period ending October 20, 2001 (DX 13B).

[131] Kelly testified that he used a rate of $9.05 as stipulated in the wage determination, except for those employees whose rates were higher than the required minimum (Tr. 310, 314-15, DX 2).

16).[132] In addition, the Agency failed to calculate any back wages[133] or fringe benefits owed to Thomas Fields for the period from March 14, 2001 through the pay period ending March 24, 2001.

5. Entitlement to Recover Funds Deducted From Employee Paychecks.

The Agency also seeks to recover the amounts deducted by Respondents from the employees' paychecks, which had the effect of increasing the disparity between the employees' rate of pay and the minimum wage required under the contract. In particular, the Agency is seeking to recover the amounts deducted from the H-2B workers' pay as rental payments for the housing provided by Respondents, as well as the $100 deductions that were applied to nine H-2B workers who failed to provide social security numbers. In addition, DOL is seeking repayment of the amounts deducted for equipment damage and other miscellaneous deductions. For the reasons described below, I find that the funds which were deducted from these workers' pay must be repaid.

a) Rent Deductions.

Regulations implementing the SCA provide in pertinent part that an employer will fail to meet the wage requirements of the Act if it makes unauthorized deductions that reduce the wage payment made to its employees below the minimum wage required by the Act and the contract. 29 C.F.R. § 4.168(a). Authorized deductions for the cost of lodging are addressed in § 4.167, which permits employers to include as part of the applicable minimum wage "the reasonable cost or fair value, as determined by the Administrator, of furnishing an employee with 'board, lodging, or other facilities,' . . . in situations where such facilities are customarily furnished to employees, for the convenience of the employees, not primarily for the benefit of the employer, and the employees' acceptance of them is voluntary and uncoerced." 29 C.F.R. § 4.167; *see generally In re Rob Sweat and Assoc. and Tony and Susan Alamo Christian Found., Inc.* 1991 WL 733671 (BSCA 1991). The regulation further states that the determination of "reasonable cost" must be made "in accordance with the Administrator's regulations under the [FLSA], contained in . . . part 531 of this title," which explain the terms used in § 4.167. *Ibid.*[134] It is undisputed that Respondents deducted $87.50 from the wages paid to H-2B employees on a biweekly basis.[135]

Several courts have held that Part 531 "permits a credit for housing by an employer only if *all* of its employees are customarily furnished with the benefit." *Adm'r v. IHS, Inc*., 93 ARN-1 (ALJ Mar. 18, 1996) (Assoc. Chief ALJ Guill) (emphasis added) (denying wage credit where housing was furnished only to Australian nurses, but not to U.S. nurses)*; see also Archie v.*

[132] There is no evidence that Jackson was paid for any of his work. However, the revised Kelly spreadsheet erroneously indicates zeros in the columns for back wages due (Att. A. at 16, Column L and O).

[133] Since Fields' hourly rate during this pay period ($10.50) exceeded the minimum wage, his back wages consist only of improperly subtracted break time and overtime pay, if any (DX 5).

[134] Sections 531.3 and 531.4 explain the term "reasonable cost." In so doing, § 531.4 incorporates the "customarily furnished" requirement. One must then consult § 531.31 which defines the term "customarily" and § 531.30 which explains the term "furnished," as well as the case law that further interprets these terms.

[135] Same amount was charged in rent for the Anacostia house and the Bladensburg house.

Grand Cent. P'ship, Inc., 86 F.Supp.2d 262, 269 (S.D.N.Y. 2000) (denying credit where housing was offered only to homeless or formerly homeless employees of the shelter, but not to other staff members, who did the same types of work). These cases make it clear that even when an employer isolates a group of employees reasonably expected to be in need of housing, such selective provision of lodging does not satisfy the "customarily furnished" requirement. In this case, it is undisputed that Respondents offered housing only to their H-2B workers, but not to the similarly employed non-H-2B workers.

Furthermore, the evidence does not establish that the H-2B workers voluntarily accepted wage credit for lodging as a term of their employment, as required by the regulations. *See* 29 C.F.R. §§ 4.167 and 531.30.[136] Even among those courts that dispute the validity of the "voluntariness" requirement under the FLSA (§ 531.30), several have recognized that, as a general rule, wage credit is not appropriate if the employer does not afford its employees a choice between accepting wage credit as a term of employment and not accepting employment on these terms. *See, e.g., Donovan v. Miller Props.*, 547 F.Supp. 785, 789-90 (M.D. La. 1982), *aff'd, Donovan v. Miller Props., Inc.*, 711 F.2d 49 (5th Cir. 1983); *Davis Bros., Inc. v. Donovan*, 700 F.2d 1368, 1371 (11th Cir. 1983); *see also Lopez v. Rodriguez*, 668 F.2d 1376, 1380 (D.C. Cir. 1981). In particular, these courts recognized the importance of the employees being fully informed about the wage credit when they enter into an employment contract, and that such credit is not appropriate where employees were misled or provided with substandard accommodations. *Ibid.* Not surprisingly, the courts have stressed the importance of this requirement in cases involving immigrant workers. Thus, in a case factually similar to the present case, the court found that acceptance of benefits by an employee was involuntary, because the employer took advantage of a non-English speaking alien who "had no other place to live and no choice but to accept food and facilities provided by employer." *Intraworld Commodities, Corp.*, 24 W.H. Cases 860 at ¶33,922; *cf. Lopez v. Rodriguez*, 668 F.2d at 1376 (distinguishing *Intraworld* on the basis that "living-in" was a necessary condition of employment for a Bolivian housekeeper).

Here Respondents failed to carry their burden of showing that, when the workers accepted employment with Respondents, they were informed about the nature of the accommodations and accepted them as wage credit. Jones testified that when the H-2B workers arrived in Washington, he offered to move them temporarily into a hotel "or something of that nature," but explained that it would be more expensive for them if he did (Tr. 544). Jones further testified that all the workers agreed to stay in the house on High Street and did not want to go

[136] Section 4.167 allows wage credit only if "the employees' acceptance of [facilities] is voluntary and uncoerced." 29 C.F.R. § 4.167. Section 4.167 also refers to § 531.30, which states that "[n]ot only must the employee receive the benefits of the facility for which he is charged, but it is essential that his acceptance of the facility be voluntary and uncoerced." 29 C.F.R. § 531.30. Several courts have held that § 531.30, which interprets § 203(m) of the FLSA, improperly incorporated the "voluntariness" requirement into the FLSA. For a discussion of the debate regarding the validity of the "voluntariness" requirement under the FLSA see *Donovan v. Miller Props.*, 711 F.Supp. 785, 787-90 (M.D. La. 1982), *aff'd, Donovan v. Miller Props., Inc.*, 711 F.2d 49 (5th Cir. 1983). It is unclear to what extent these holdings affect the validity of § 4.167 which interprets the SCA to require "voluntariness." Furthermore, a controlling decision of the D.C. Circuit Court recognized the validity of the "voluntariness" standard under the FLSA, but interpreted it narrowly as requiring that the employee voluntarily accept the job knowing the facility will be part of his compensation. *Lopez v. Rodriquez*, 668 F.2d 1376, 1380 (D.C. Cir. 1981). In the end, there is no need to resolve this issue in the present case, because Respondents are not entitled to a wage credit in any event.

back to Mexico (Tr. 544). Some, but not all, employment applications signed by the H-2B workers in this case reflect a notation at the bottom of the signature page. The notation, which is written in English and printed in type-size which is substantially smaller than the other print appearing in the application, reads in pertinent part as follows:

> Statement of understanding between Lawn Restoration Service, Inc and the above named applicant. 5 April, 2001
>
> LRS officials informed me that housing was available for the requested 10 H-2B workers. Due to the arrival of the unrequested 11 H-2B workers housing is unavailable.
>
> I understand and willfully accept the temporary housing accommodations at 2260 High Street S.E. LRS will automatically deduct $87.50 for rent from my salary on a bi-weekly basis.

(RX 25).

Under the facts presented here, I find that Respondents' employees were not given a meaningful opportunity to accept or reject this term of employment. Having just arrived from Mexico with hardly any funds and no knowledge of English, Jones essentially told them they could live in the house he was willing to provide or they could find some place else to stay which was likely to cost them more (Tr. 544, 552). In addition, whether any of the H-2B workers actually understood the notation that appeared on some of their employment applications is also questionable since the "statement of understanding" was written in English in small print and most of the workers spoke Spanish only.

Furthermore, it is clear that acceptance of lodging can only be "voluntary" if the quality of the housing provided by the employer approximates the reasonable expectations of the employees at the time they accept it as a term of their employment. Isaac Vasquez testified that prior to arriving to the United States, the H-2B workers "were told that we were going to get apartments, and we got a house that – forget it. It was just no good" (RX 15 at 37).[137] In fact, Jones testified that he originally intended to house the H-2B workers in three five-bedroom houses (Tr. 537). Instead, the workers were provided with housing that was described by several witnesses as substandard. Thus, DOL Investigator Eva Gross testified that the Anacostia house appeared abandoned, had very poor lighting, had a hole in the ceiling, and contained a "bare minimum" of old furniture (Tr. 105-06). Likewise, Investigator Ingrid Quiles testified that the house was in a "deplorable" condition, appeared abandoned, had hardly any lighting, was sparsely furnished with broken furniture, and was infested with rats (Tr. 81-82).[138] Investigator

[137] This statement is corroborated by Jones' testimony that the H-2B workers he employed in 2000 were housed in an apartment building owned by an individual named Jerry Hudley, and that Jones had an agreement with Hudley to rent his apartments for the H-2B workers in 2001, but Hudley never provided such housing (Tr. 697-8).

[138] Respondents point out that the testimony of Ingrid Quiles and Eva Gross regarding the poor living conditions in the Anacostia house are based on the observations made in late September and early October, 2001, when only a few of the workers residing in these houses continued to be employed by Respondents (R Br. at 36). However, the fact remains that the Anacostia house was overcrowded, and statements of Pedro Chavez and Isaac Vasquez confirmed this testimony (DX 15 at 36-37; DX 13 41)

Zylstra also testified that the Anacostia house appeared structurally unsound (Tr. 154). This testimony was confirmed by Pedro Chavez and Isaac Vasquez, who stated that the Anacostia house was in a very poor condition, infested with rats and cockroaches, had "holes everywhere," and appeared abandoned (DX 15 at 36-37; DX 13 at 41). Similarly, as noted below, the living conditions at the Bladensburg house failed to satisfy the minimum standards established by the housing code (Tr. 466-70). Thus, in light of the applicable case law and the facts of this case, Jones's testimony that the workers voluntarily accepted housing as a wage credit is entitled to little weight (Tr. 700-01).[139]

Furthermore, even if the aforementioned regulatory requirements were met, it would be wholly inappropriate to allow Respondents a credit towards the minimum wage required under the contract for either the Bladensburg or Anacostia house because no such credit is allowed where facilities are "furnished in violation of any Federal, State, or local law, ordinance or prohibition." 29 C.F.R. § 351.31.[140] Timothy McNamara, a supervisor of the Code Enforcement Division of the Bladensburg Police Department, testified that his inspection of the Bladensburg house on August 16, 2001 revealed several housing code violations (Tr. 466-70).[141] In particular, he concluded that the house did not contain smoke detectors or a functional bathroom, and could not reasonably accommodate eight people (Tr. 468-70). Also, it is clear that housing 21 or 22[142] workers in the Anacostia house through May 5, 2001[143] constituted a housing code violation, and thus no wage credit can be given for that period (Tr. 553). Although Jones testified that approximately eight workers continued to reside in the Anacostia house after nine workers were moved to Bladensburg on May 5, 2001, the payroll record shows that in June, 2001, twenty H-2B workers continued to be employed by Respondents (Tr. 533; DX 5 at 59-62 and 65-68).[144] Thus, it appears that eleven workers continued to reside in the Anacostia house, which, according to several witnesses, had only two bedrooms (and another smaller room that served as a bedroom)[145] and two bathrooms, was structurally unsound, poorly furnished, and

[139] Respondents also claim that they did not intend to "economically deprive" the H-2B workers (R Brief at 35). However, this assertion and Jones' aforementioned testimony are particularly disingenuous in light of the fact that Respondents made a significant profit by renting the Anacostia house to 21 workers during April and May 2001 (DOL Br. at 49; Tr. 684-85, RX 30; RX 72; DX 13 at 39-41; DX 15 at 40-41).

[140] Such facilities are not considered "customarily" furnished. *Ibid.*

[141] McNamara explained that he did not cite Respondents for the code violations because he was asked by the tenants, a representative of the Mexican Embassy, and an attorney from CASA of Maryland to hold off on any action out of a concern for retaliation against the workers by Respondents (Tr. 470, 473).

[142] The evidence suggests that the number of workers living in the Anacostia house during April (and possibly May), 2001 changed from 21 to 22. As noted above, Respondents picked up 21 H-2B workers on April 4, 2001 (Tr. 411, 543-43), but two of them (Lara Rosando Espinoza and Pedro R. Hernandez) left respondents employ after the pay period ending April 21, 2001, and were replaced with three other H-2B workers (Jorge Luis Cruz Norberto, Jorge Luis Castro Hernandez, and Benito Morales Vasquez) (Att. A).

[143] Although Jones indicated that nine workers were moved to the Bladensburg house on May 5, 2001, both Pedro Chavez and Isaac Vasquez have stated that they continued to reside in this house until late May or early June, 2001 (Tr. 116; GX 13 at 39-41; GX 15 at 40-41). Respondents offered no documentary evidence as to when the purchase of the Bladensburg home was finalized to support Jones' testimony that the workers were moved on May 5, 2001.

[144] The three H-2B workers that were no longer employed by Respondents in June are Rosando Lara Espinoza, Jaime Lara Espinoza, and Pedro R. Hernandez.

[145] According to Isaac Vasquez and Pedro Chavez, the house also had a living room, a dining room and a basement (DX 15 at 37; DX 13 at 41).

infested with rats and cockroaches (Tr. 154; 116-17; DX 13 at 41-42; DX 15 at 36-38).[146] All in all, the evidence strongly suggests that housing eleven (or even eight) employees in that building constituted a housing code violation. Accordingly, no credit can be given to Respondents for the expenses they incurred in renting out either the Bladensburg or the Anacostia house to the H-2B workers.

Finally, DOL is correct in stating that Respondents failed to satisfy their burden of proving that the amounts deducted for rent were reasonable (DOL Br. at 49-50); *see generally Donovan v. New Floridian Hotel*, 676 F.2d 468, 475 (11th Cir. 1982) (burden of proving reasonable cost of housing is on employer). The previously described evidence clearly shows that the conditions under which the workers were housed were substandard, and rent deductions made by Respondents from their wages significantly exceeded Respondents' costs (RX 72).[147] The deductions sought by Respondents for rent will therefore be denied.

b) Deductions for Equipment Damage and Other Miscellaneous Deductions.

It is undisputed that Respondents made deductions for equipment damage from the wages of both H-2B and non-H-2B employees (DX 5 and 6; Tr. 614-19, 856-8). These deductions violated the SCA because they do not fall into any of the categories of deductions authorized by the controlling regulations and had the effect of reducing the wages paid to workers below the required minimum. 29 C.F.R. §§ 4.167 and 4.168.

Jeffrey Jones also acknowledged that he authorized deductions of $100 from the paychecks of nine H-2B employees after they refused to produce Social Security numbers, since Respondents could, according to Jones, be fined $50 by the Internal Revenue Service and $25 by Paychex for every employee whose Social Security number was not provided (Tr. 619, 622, RX 28 and 29).[148] These deductions, like the equipment deductions, must be returned to the employees because they cut into employees' minimum wage and were not authorized by the regulations. *See* 29 C.F.R. §§ 4.167 and 4.168. Even if a portion of the $100 deductions authorized by Jones was intended to compensate Respondents for payment of $50 fines to the IRS, which would arguably fall within the category of "deductions . . . required by law," Respondents have never claimed that such fines were in fact assessed and presented no evidence to that effect. These funds must therefore be repaid by Respondents as part of the back wages owed to the employees from whom the deductions were made.

A number of other deductions were also made and recorded in the "advances" column of Respondents' payroll journal (RX 5 and 6). However, Jones was unable to explain either why several of these deductions were made or why they appeared in the "advances" column (Tr. 852-53). Having failed to establish any legitimate basis for these deductions, I find that these unexplained deductions were inappropriate and must be returned to the employees. The revised

[146] Respondents' claim that the testimony of Ingrid Quiles and Eva Gross relates to the time when only a few residents of the Anacostia house continued to be employed by Respondents is addressed and dismissed above.

[147] Furthermore, because Respondents could not properly credit the cost of providing housing towards the employees' wages, they are not entitled to wage credit for the cost of any repairs (Tr. 709-15, RX 33).

[148] Although these deductions appear in the payroll records in a column entitled "advances," Jones acknowledged that these amounts actually represented deductions (Tr. 846).

Kelly spreadsheets contain a separate table that summarizes such deductions (Att. A at 23).[149] Given my earlier finding that the Agency may recover back wages for the period ending October 20, 2003, the Agency's calculations must be adjusted to exclude any deductions made after this date (Att. A at 23, Column F).

6. Expenses as "Offset" to Back Wages and Benefits.

Respondents claim that "the salary reflected in the [H-2B workers'] . . . paychecks is not the sole compensation that the employees received" because the workers were provided with additional compensation in the form of housing and various "facilities"[150] (Opp. to DOL Mot. at 4).[151] On this basis, Respondents seek to avoid or minimize their liability for back wages under 29 C.F.R. § 4.167, which permits employers, under certain circumstances, to include as part of the applicable minimum wage the reasonable cost or fair value of board, lodging, or other facilities. Although Respondents did not explicitly make this claim in their post-hearing brief, this issue warrants consideration in light of the substantial evidence presented at trial concerning the value of these "facilities." [152]

As noted above, the regulations allow employers to credit as part of the applicable minimum wage (with a corresponding reduction in liability for back wages and benefits) the reasonable cost or fair value of furnishing employees with board, lodging, or other "facilities" if such facilities are "customarily furnished to employees, for the convenience of the employees, not primarily for the benefit of the employer, and the employees' acceptance of them is voluntary and uncoerced." 29 C.F.R. § 4.167; *see also* 29 C.F.R. §§ 531.4, 531.30 and 531.31; *see generally In re Rob Sweat and Assoc. and Tony and Susan Alamo Christian Found., Inc.* 1991 WL 733671. In the present case, I find that Respondents' liability cannot be offset by the cost or value of any of the non-housing "facilities" supplied to workers,[153] *i.e.,* free transportation, utilities, furniture, bed linens, food, clothing, and household supplies (RX 33, 34, 71), since Respondents failed to satisfy the requirements set forth in the relevant regulations and case law. 29 C.F.R. § 4.167 and part 531.

First, as noted above, the courts have interpreted the regulations to permit a wage credit only when an employer furnishes *all* of its employees performing similar work with the same benefits.[154] *See Archie v. Grand Cent. P'ship, Inc.*, 86 F.Supp.2d at 270 (denying wage credit for counseling services where only those employees who were homeless or formerly homeless

[149] Deductions that appear in the "advances" column are summarized in a table on page 23 of the revised Kelly spreadsheets.

[150] Hereinafter, the term "facilities" is used broadly as it is defined in 29 C.F.R. § 531.32(a) to include housing, meals, clothing, household effects, utilities, etc.

[151] Respondents' admissions made during the discovery and Jones' testimony suggested that the only compensation paid by Respondents to its employees was the hourly rate reflected in the Paychex payroll journal (DOL Reply to Opp. at 5; DOL Att. B, Admission No. 35). Thus, their claim now that employees were provided with additional compensation not reflected in the payroll records seems somewhat disingenuous.

[152] Instead, Respondents discussed the various "benefits" provided to the employees as part of their argument that they should be relieved from debarment, which is addressed below (R Brief at 35-7).

[153] For the reasons discussed in the preceding section of this decision, Respondents may not offset their liability by any portion of the cost or value of housing provided to the H-2B employees.

[154] This requirement fulfills the "customarily furnished" element of the wage credit test under 29 C.F.R. 531.31.

were able to partake of these services); *see also Adm'r v. IHS, Inc.*, 93-ARN-1. It is undisputed that Respondents did not provide all similarly employed workers with such facilities.

Second, the language of the regulations suggests that, as a rule, the "customarily furnished" requirement is satisfied where the facilities are provided pursuant to an established policy of which employees are made aware (hence the words "customarily," "regularly," "voluntary," and "uncoerced"). 29 C.F.R. §§ 4.167 and 531.30. There is no evidence that Respondents had a policy of taking into account the reasonable cost or value of any of the aforementioned facilities in calculating the wages paid to the H-2B workers. In fact, when Jones testified as to how he came up with the wage rate for the H-2B workers, he never mentioned taking into account facilities (Tr. 703-04). He also testified that he intended to stop providing transportation after the first few weeks, but did not indicate that he intended to increase employees' wages accordingly (Tr. 564-67).

In addition, food, clothing, and household supplies were not "customarily" furnished because they were not furnished "regularly," as required by the applicable regulation. 29 C.F.R. § 531.31. A wage credit is appropriate only when provision of benefits approximates the regularity and reliability of wage payments. *See generally Cuevas v. Bill Tsagalis, Inc.*, 500 N.E.2d 1047 (Ill. App 2nd Dist. 1986) (denying employer credit against minimum wage obligations based, in part, on the fact that the occupancy of lodging was irregular). Respondents purchased clothing and household supplies for the employees on only a few occasions, and provided food only during the first three and a half weeks of their employment (Tr. 407). These facilities were thus not provided in any manner which approximates the regularity and reliability of wage payments.

Furthermore, there is no evidence that the H-2B workers voluntarily accepted as a term of their employment these "facilities" as a wage credit. *See* 29 C.F.R. §§ 4.167 and 531.30. Even those courts that dispute the validity of the "voluntariness" requirement contained in § 531.30 have recognized that no wage credit should be granted where an employer fails to at least inform the workers that facilities would be provided in lieu of the monetary wages.[155] *See, e.g.*, *Davis Bros., Inc. v. Donovan*, 700 F.2d 1368, 1371 (11th Cir. 1983). Similarly, as noted above, several courts have held that the "voluntariness" requirement is satisfied only where employees voluntarily (and thus knowingly) accept wage credit as a term of their employment (even though these courts refused to recognize that the employees must be given a choice of receiving all of their wages in cash). *Miller Props.*, 547 F.Supp. at 789-90, *aff'd*, *Miller Props., Inc.*, 711 F.2d at 49; *Marshall*, 640 F.2d at 906; *see also Lopez v. Rodriguez*, 668 F.2d at 1380. Thus, in the present case, there is no need to resolve the longstanding debate regarding the validity of the "voluntariness" provision, since Respondents do not deserve wage credit under any of the aforementioned interpretations of the regulation. Respondents never indicated to the H-2B workers that their wages would be reduced because facilities would be provided in lieu of the monetary wages (except with regard to the rent deductions discussed above). It is impossible to accept, let alone accept voluntarily, a term of employment of which one is unaware. *Cuevas*, 500 N.E.2d at 1054-55 (denying employer wage credit for lodging provided to employee where it

[155] As stated above, it is unclear to what extent the debate regarding the validity of § 531.30 affects analysis under § 4.167. However, as shown below, there is no need to resolve this issue in the present case as it would not change the conclusion.

was not shown that employee understood that lodging expenses would be part of his compensation package).

As noted above, in a factually similar case, the court found that the employer was not entitled to a wage credit because he took advantage of a non-English speaking alien who "had no other place to live and no choice but to accept food and facilities provided by employer." *Intraworld Commodities, Corp.*, 24 W.H. Cases 860 at ¶33,922. By comparison, in *Donovan v. Miller Props.*, the court approved wage credit and distinguished *Intraworld* on the basis that Intraworld's employees were misled when they entered into the employment contract, while in *Donovan* the employees were *informed of the meal credit* when they were hired. 547 F.Supp. at 789 (emphasis added). The present case is clearly analogous to *Intraworld*, because there is no evidence that Respondents informed the H-2B workers that transportation, utilities, or any other "facilities" were being provided in lieu of wages.

Finally, even if all the aforementioned requirements were met, the record fails to provide a sufficient basis upon which to determine the "reasonable cost" of facilities allegedly furnished by Respondents to their workers. Respondents presented inconclusive evidence regarding the alleged purchases and value of furniture,[156] clothing, bedding, and other household supplies[157] (RX 34). 29 C.F.R. §§ 4.167 and 4.168.[158] Furthermore, the record contains no evidence regarding how much money was purportedly spent on each employee. Thus, as DOL correctly states, "the alleged supplies provided to the H-2B employees cannot be allocated, and the Respondents should not be allowed to credit such alleged purchases to the employees' wages" (DOL Br. at 18).

B. Debarment.

The standards for debarment differ under the SCA and the CWHSSA. According to the CWHSSA, the burden is on DOL to justify debarment by showing that the violations were "aggravated or willful." 29 C.F.R. § 5.12(a). By contrast, under the SCA, debarment is presumed once violations of that Act have been found, unless the violator is able to establish the existence of "unusual circumstances" that warrant relief from this sanction. 29 C.F.R. § 4.188(a) and (b). The two Acts also impose different debarment sanctions. The SCA prescribes debarment for three years, without modification, while a contractor debarred under the CWHSSA is ineligible for government contracts for a period "not to exceed" three years, 29 C.F.R. § 5.12(a)(1), and may petition for relief from debarment after six months. 29 C.F.R. § 5.12(c). In the present case, analysis under the CWHSSA is unnecessary because, as explained

[156] To prove the value of furniture, Respondents offered an inventory prepared by Jones, photographs of mattresses and bed frames, and photographs of certain rooms in the two houses occupied by the H-2B workers (RX 34, 61).
[157] Respondents offered into evidence a store receipt reflecting a purchase of several "household" items for a total sum of $44.47 (RX 35 at 0813), and Lawn Restoration's credit card statement showing a $165.02 purchase made in Wal-Mart on May 28, 2001 with a handwritten notation "clothes for H2B" next to it. This evidence, however, does not prove that these purchases were intended for the H-2B workers, and only H-2B workers.
[158] "Where as here, the employer has not requested a § 531 determination of 'reasonable cost' of 'facilities,' and the Administrator has made no determination, and where the record contains only employer's unsubstantiated cost estimates . . . employer's burden has not been satisfied." *In re Rob Sweat and Assoc. and Tony and Susan Alamo Christian Found., Inc.* 1991 WL 733671.

below, Respondents are subject to debarment under the SCA, which prescribes an automatic three-year period of debarment.

The debarment provision of the SCA states:

> The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later than ninety days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this chapter.

41 U.S.C. § 354(a). As noted above, debarment is presumed whenever there is a finding of violations under the Act unless the contractor is able to show the existence of "unusual circumstances." 29 C.F.R. §§ 4.188(a) and (b); *see Hugo Reforestation, Inc.*, ARB No. 99-003, ALJ No. 1997-SCA-20 (ARB Apr. 30, 2001); *A to Z Maintenance,* 710 F. Supp. 853, 855 (D.D.C. 1989). "The debarment of contractors is the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction." *Sec'y of Labor v. Glaude*, ARB No. 98-081, ALJ No. 1995-SCA-38, slip op. at 6-7 (ARB Nov. 24, 1999) (quoting *Vigilantes v. Adm'r of Wage and Hour Div.*, 968 F.2d 1412, 1418 (1st Cir. 1992).

The term "unusual circumstances" is not statutorily defined and any determination with respect thereto "must be made on a case-by-case basis in accordance with the particular facts present." 29 C.F.R. § 4.188(b)(1). Neither ignorance of the SCA's requirements nor negligence, *e.g.*, failure to read and become familiar with the terms of the contract, are sufficient to demonstrate unusual circumstances. *See* 29 C.F.R. § 4.188(b)(1) and (b)(6); *Integrated Res. Mgmt, Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14 (ARB June 27, 2002). Similarly, the lack of a history of noncompliance is insufficient to establish unusual circumstances. *See, e.g., Jernigan's Backhoe and Loader,* Case No. 86-SCA-9 (Dep. Sec'y. May 16, 1991) (finding of unusual circumstances does not turn solely on the absence of culpable conduct, but must take into account, *inter alia,* history of similar violations and compliance history, cooperation, payment of monies due, and assurances of future compliance).

The determination as to whether unusual circumstances exist is governed by a three-part test. 29 C.F.R. § 4.188(b)(3)(i)-(ii); *Hugo Reforestation, Inc., supra*. Under part one, the contractor must establish that the violations were not willful, deliberate, aggravated in nature, or the result of "culpable" conduct,[159] and must also demonstrate an absence of a history of similar,

[159] "Culpable conduct" is defined in the regulation to include culpable neglect to ascertain whether practices are in violation, culpable disregard of whether the contractor was in violation, or culpable failure to comply with record-keeping requirements. 29 C.F.R. § 4.188(b)(3)(i).

repeated, or serious violations of the SCA. 29 C.F.R. § 4.188(b)(3)(i). Under part two of the test, the contractor must show a "good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance." 29 C.F.R. § 4.188(b)(3)(ii). Finally, under part three, a variety of factors must be considered, including any prior investigations for violations of the Act, recordkeeping violations which impeded the investigation, the existence of a "bona fide legal issue," the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any violations (including the impact on employees), and whether the amount due was promptly paid. 29 C.F.R. § 4.188(b)(3)(ii). It is "the violator of the Act [who] has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction." 29 C.F.R. § 4.188(b)(1).

Respondents, as explained below, have failed to meet their burden of demonstrating "unusual circumstances" under any of the three parts of the SCA debarment test.

1. Part I of the SCA Debarment Test.

The evidence of record convincingly proves that Respondents' SCA violations were willful, deliberate, aggravated in nature, and the result of culpable conduct. For example, as DOL correctly notes, Respondents deliberately chose to underpay workers beginning July 5, 2001 when they adopted a policy that employees would be paid for only 15 minutes of work at the beginning and end of each shift to load and unload equipment, regardless of how long the work actually took. Respondents' policy also provided that workers would not be compensated for travel time between the shop and worksites, despite the fact that such time is clearly compensable. The record in this case establishes that the amount of time spent by workers loading and unloading equipment, and traveling to and from the D.C. parks and recreational centers at which they worked, routinely exceeded the time for which these workers were paid under the policy adopted on July 5, 2001.[160]

I note that, despite my prior ruling to the contrary, Respondents continue to describe the July 3, 2001 memorandum as a "fraud" which has never been authenticated. R. Br. at 36. As stated above, I determined for a variety of reasons that this memorandum is what it purports to be, *i.e.*, a memorandum from Jones to Lawn Restoration workers. For example, while the memorandum does not contain Jones's actual signature, his name and title are reflected therein as the person who authored it. In addition, although the format of the memorandum differs somewhat from other memoranda of record, Respondents have admittedly used memoranda in various formats to communicate with their workers, and the contents of the July 3, 2001 memorandum demonstrate that its author had first-hand knowledge of Respondents' business operations. Furthermore, the testimony and statements made by Respondents' employees confirm that the policy set forth in the memorandum was in fact implemented, and both Pedro Chavez's diary and Respondents' own sign-in sheets reflect changes after July 5, 2001 consistent with the new policy described in the memorandum. Finally, and most significantly, Jones not only did not deny the existence of the memorandum when Investigator Zylstra questioned him during their October 2001 meeting at Respondents' office, he acknowledged the change in policy reflected therein and explained that it was meant to deter inefficient use of time by the workers

[160] The evidence similarly reflects other instances of Respondents' choosing not pay workers for time worked as well, *e.g.*, time spent by H-2B workers on April 5 and 6, 2001 in training and orientation.

while loading equipment. I thus have no doubt that the memorandum is in fact a genuine business record of Lawn Restoration, that Respondents' change in policy was deliberate, and that this change in policy clearly resulted in the underpayment of compensation to Lawn Restoration workers.

I also find that Jeffrey Jones's statements that he was unaware of the wage and benefits requirements of the contract when he met with Investigator Zylstra in October 2001 are not credible. While Jones asserts that the $8.00 rate he chose to pay workers performing services under the contract was based on an advertisement he saw in the Washington Post and a conversation he had with the president of Amigos, the evidence of record clearly contradicts his testimony. Jones testified at the formal hearing as follows:

> Q Mr. Jones, how did you determine what hourly wage to pay your H-2B workers in the year 2001?
>
> A I had a –
>
> Q Speak up.
>
> A I had a conversation with the president of Amigos, Bill Winfield.
>
> Q And tell the Court again what Amigos is?
>
> A Amigos is the agency that sent the H-2B guys to me. The reason I had this conversation was because I had read in the Washington Post a – an ad for other H-2B employees to come to the Washington area for $7.24. So I spoke to Bob Winfield and I asked, why am I paying 9.05 and others are paying 7.24? He in turn said a reasonable rate is 7.24 in your area. I wouldn't pay these guys $7.24. I would pay them around $8. So that's where I got that $8 from.

(Tr. 703-04). Although Jones's testimony suggests his conversation with Amigos occurred when he first arranged to hire the 23 H-2B employees who arrived in Washington, D.C. on April 4, 2001, and that he decided *at that time* to pay the H-2B workers $8.00 per hour based on his telephone conversation, correspondence to Jones from Amigos makes clear that was not the case. In a September 26, 2001 letter to Jones from Anita Cruz, a Case Manager at Amigos, he was informed that:

> [T]he prevailing wage in your area went from $9.05 to $7.24. . . . Please keep in mind that new workers hired during the 2002 season will need to get paid starting at $8.00 an hour. All returning workers must get paid at their current rate.

(RX 24). Jones was thus informed in September that the prevailing wage for 2001 was $9.05 per hour, that wage was being reduced for the 2002 season, and he could pay new workers hired for the 2002 season a wage of $8.00 per hour. However, Respondents'

payroll records make clear that Jones had been paying his H-2B workers $8.00 per hour from their first day of work in April 2001, so he obviously did not decide on that rate based on the conversation he had with Amigos in September 2001. *See, e.g.*, DX 5 at 24-98. Furthermore, the Amigos letter notes that the prevailing wage was reduced from $9.05 per hour but that "[a]ll *returning workers* must get paid at their current rate [*i.e.*, $9.05 per hour]." (RX 24) (italics added). Thus, Jones knew that he could not reduce the rate to $8.00 per hour for any workers who were subject to the prior prevailing wage rate, and his testimony at the hearing that he decided to pay the H-2B workers $8.00 per hour based on his conversation with Amigos is obviously untrue.

I also find that Jones's statements that D.C. contracting officers knew he was paying workers less than the required wage rate are simply not credible. These contracting officers, who were undoubtedly familiar with the wage and benefits provisions of the contract they were administering, have an obligation to ensure that government contractors, such as Lawn Restoration, comply with all contract requirements. It is inconceivable to me that they would simply ignore a statement by Jones that he was paying workers less than the prevailing minimum wage and acquiesce in such conduct.[161] In addition, although Jones could have called one or more of the D.C. officials with whom he allegedly spoke as witnesses in this case to confirm his assertions, he did not do so. This lack of evidence to support his statements strongly suggests that no such evidence exists. *See, e.g., United States v. Wilson, supra,* 322 F.3d at 364; *United Auto Workers v. NLRB, supra,* 459 F.2d at 1336.

With respect to whether Respondents engaged in aggravated or culpable conduct, DOL asserts, and I agree, that Jones grossly overcharged 21 H-2B workers for rent on the Anacostia and Bladensburg houses and improperly deducted $900.00 from their paychecks for potential "fines" which were, based on the evidence before me, never paid.

While Jones's expenses for April and May 2001 relating to the Anacostia house were only $2,865.68, he collected in rent a total of $7,350.00 from the H-2B workers residing there. Jones thus realized a profit of $4,484.32 for those two months alone. In light of the fact that the Anacostia house was clearly overcrowded, under furnished, and in very poor condition, as confirmed by the testimony of DOL investigators and statements of the H-2B workers who resided there, the profit made by Jones on rent is unconscionable.

Similarly, Respondents collected $1,750.00 in rent from ten H-2B workers residing in the Bladensburg house in June 2001, while Jones's expenses for that residence totaled only $1,070.00. He thus realized a profit of $680.00 on the Bladensburg house for the month of June 2001. While this house was, according to Investigator Zylstra, in much better condition than the Anacostia house, Officer McNamara of the Bladensburg Police Department determined that the

[161] Even if I accepted Jones' statements as true, Respondents would not be relieved of their liability for violating the subject contract since a mere perceived "approval by silence" or "failure to alert" does not give rise to estoppel and does not constitute grounds for detrimental reliance. *Admin'r v. HIS*, 93–ARN–1 (ALJ Mar. 18, 1996).

house was overcrowded, contained no smoke detectors, and had only one functional toilet.[162] The rent charged and profit realized by Jones were, under these circumstances, also excessive.

Finally, with respect to the $900.00 withheld from workers' paychecks because they did not have Social Security numbers, Respondents failed to introduce any evidence that the funds withheld were ever used to pay "fines" imposed either by Pachex, Inc. or by the IRS. Even if those fines had in fact been imposed, the total fine per worker would have been only $75.00 versus the $100.00 actually withheld. In either event, Respondents improperly profited from these deductions to the detriment of their workers.

After observing Jones during the course of the week-long hearing in this case, listening to his hearing testimony, reviewing various records maintained by his business, and reviewing his prior deposition testimony, I have no doubt that Jones is an astute businessman who, at the time of the investigation, was well aware of his obligations under the D.C. contract. His testimony to the contrary is simply not credible. Furthermore, even if Jones's assertions were truthful, neither simple negligence nor ignorance of the law, as noted above, constitutes "unusual circumstances" which would preclude debarment. *See* 29 C.F.R. § 4.188(b)(1) and (b)(6). In fact, where, as here, the SCA requirements are plain from the face of the contract, the contractor is "at least culpably negligent in failing to read and perform them." *See Integrated Res. Mgmt, Inc.*, ARB No. 99-119, ALJ No. 1997-SCA-14 (ARB June 27, 2002). The regulations specifically state that such "culpable neglect to ascertain whether practices are in violation" constitutes sufficiently aggravated conduct to preclude relief from debarment. 29 C.F.R. § 4.188(b)(3)(i).

This evidence taken together establishes that the aforementioned violations were the product of Respondents' willful, deliberate, and culpable conduct, and consequently, Respondents have failed to establish "unusual circumstances" under part one of the debarment test.

2. Part II of the SCA Debarment Test.

Although their failure to meet Part I of the "unusual circumstances" test would alone be sufficient to order debarment, I further find, as explained below, that Respondents have not established either that they cooperated in DOL's investigation of this matter, or that they repaid moneys due covered employees for back wages and benefits. Respondents have thus failed to meet the second part of the debarment test as well.

During the investigation, Jones failed to produce time and attendance records requested by Investigator Zylstra, as well as the names, addresses, and social security numbers of Respondents' non-H-2B workers. Although Jones denied this, I find his statements are not credible in light of the various false and inconsistent statements contained in the record before me. In particular, as discussed above, Jones falsely claimed ignorance of the wage rate required

[162] Officer McNamara described the house as a "one story, single family home, three bedrooms, one bath, living room, dining room, kitchen and basement" (Tr. 468). He further testified that the house contained 11 beds (some located in closets and the basement), but most mattresses were placed on the floor and one mattress was on a makeshift two-by-four frame (Tr. 469). The building contained no smoke detectors, and the only toilet in the residence was not functional at the time of his inspection (Tr. 469).

by the contract, denied issuing the July 3, 2001 memorandum, and asserted during discovery that he was not authorized to issue checks on behalf of Lawn Restoration. He also admitted making a false statement in a letter to an official of the Maryland state government, in which he averred that he had no employees working in that state (DX 36), denied the existence of an employee manual despite contrary language in a March 28, 2001 letter to a new employee (RX 70), and claimed ignorance of the fringe benefits requirements of the contract in contradiction to Respondents' own "draft" employee manual (Tr. 703-04, 670-71, 873; RX 70, DX 38; DX 70).

The only evidence other than Jones's testimony offered by Respondents to contradict Zylstra regarding Jones's failure to produce time and attendance records is the testimony of Jones's sister, Marva Ray. According to Ray, she was present at Respondents' office during Zylstra's visit in October 2001 and observed Jones prepare and offer Lawn Restoration's time sheets to Zylstra (Tr. 395-98, 401-02). However, I find Ray's testimony is less credible than that of Investigator Zylstra. As note above, Respondents indicated during the hearing their intention to submit Ray's documentation regarding an alleged medical appointment as proof that she visited Respondent's office on the same day that Zylstra appeared there. Instead, Respondents submitted on March 6, 2003 a declaration executed by Ray noting she was unable to locate any such documentation and had in fact been mistaken as to the date of her doctor's appointment. Declaration of Marva Ray at ¶ 2. Ray clearly implied at the hearing that she remembered the event because of her medical appointment that same day. She testified that she had been at Lawn Restoration's office in October 2001 because "I had physical therapy that morning, so I just stopped past my brother's shop . . . I was out on sick leave, and I stopped past his shop on my way home." (Tr. 395). She not only could not produce any records relating to the medical appointment, but did not produce any records reflecting that she had been on sick leave from her place of employment at that time.

With respect to contact information for non-H-2B employees, other than Jones's testimony, Respondents' only evidence that they provided the names, addresses, and Social Security numbers for non-H-2B employees to DOL is a sheet of paper containing this information reflecting a date of October 19, 2001 (RX 13). However, this document bears markings indicating that it was transmitted to the Agency via facsimile on April 12, 2002, and thus does not corroborate Respondents' assertion that Jones supplied the information at the time of the investigation. On the contrary, according to Investigator Zylstra, the first time this document was ever produced by Respondents was "well after" he referred the case to the district office level, which would have been some time after November 14, 2001 (Tr. 282). I have no reason to doubt Investigator Zylstra's testimony. It is highly unlikely that Zylstra, an investigator with many years of experience, would not request, or would ignore if offered, contact information for all employees since such information would clearly be important to his investigation. Based on the foregoing, I find that Respondents have thus failed to carry their burden of proving cooperation in DOL's investigation.

Part two of the debarment test also requires a contractor to repay any back wages and benefits owed employees which are uncovered during the investigation. To date, Respondents have not paid *any* back wages or benefits owed to their employees, even though Jones was aware of the above-described violations at the latest in October, 2001. The question of Respondents' liability for violations of the SCA has never been seriously disputed and in fact was resolved in

my January 27, 2003 summary judgment order. While it is true that Respondents have repeatedly challenged the accuracy of the Agency's back wage computations, the deficiencies in DOL's calculations do not justify Respondents' failure to repay wages or fringe benefits over which there is no dispute.[163] Furthermore, any discrepancies in DOL's computations of wages and benefits resulting from violations of the SCA were at least in part caused by Respondents' record-keeping violations (hence Zylstra's initial attempt to reconstruct all the workers' hours based on Pedro Chavez's diary) and their failure to produce information which might have allowed for more accurate findings.

Having failed to cooperate with DOL during the course of its investigation, or to repay any wages or fringe benefits resulting from violations of the SCA, Respondents do not meet the "unusual circumstances" requirement under Part II of the debarment test. This lack of proof by Respondents, as previously noted with respect to the Part I requirements, would alone justify debarment.

3. Part III of the SCA Debarment Test.

With respect to Part III of the debarment test, I find that Respondents have committed recordkeeping violations which impeded the investigation. I also find that Respondent's liability was not dependent on resolution of a bona fide legal issue of doubtful certainty, the violations in this case have had a serious and extensive impact on unpaid employees, and no sums due these workers have been paid − promptly or otherwise − by Respondents.

As noted previously, contractors are required to maintain the records enumerated in the regulations for three years from the completion of the work and to make them available for inspection and transcription by authorized representatives of DOL. 29 C.F.R. § 4.6(g); 29 C.F.R. § 4.185; *see also* 29 C.F.R. § 4.6(g)(2)(3). It is undeniable that Respondents violated these requirements in that they failed to maintain records which segregated contract workers from non-contract workers, or which identified work performed by individual workers as either contract or non-contract work. Similarly, as described above, Respondents were less than forthcoming in making what records they had available to investigators for inspection and transcription. As a result, DOL investigators were forced to rely on interviews of workers and inadequate records in an attempt to determine the nature and extent of any violations of the SCA. The time and expense required to complete DOL's investigation would undoubtedly have been less substantial had Respondents maintained and produced the records required by the regulations. The Agency's investigation was thus clearly impeded as a result of Respondents' recordkeeping violations.

In addition, there has never been any real dispute over Respondents' liability based on a "bona fide legal issue of doubtful certainty." 29 C.F.R. § 4.188(b)(3)(ii). Liability for SCA

[163] For example, Respondents have never disputed that all of their H-2B workers performed work under the contract, were paid less than the minimum wage of $9.05 per hour, received no fringe benefits, and received overtime pay for time exceeding 80 hours during any two-week period instead of time exceeding 40 hours during any one workweek. Respondents could have, but chose not to, calculate the back wages and benefits due each of these workers based on the undisputed hours reflected in Respondent's payroll and time and attendance records without being denied the opportunity to challenge additional compensation requested by DOL for other work.

violations was, as noted above, determined this past January in an order granting DOL's motion for partial summary judgment based on the undisputed material facts then before me. The issues which Respondents have disputed since then, for the most part, are simply factual issues, such as when work under the contract began and ended, which employees performed work under the contract, and whether various workers were compensated for all hours they worked. Respondents' pursuit of these issues does not justify their failure to pay workers for the wages and benefits to which they were clearly entitled.[164]

Furthermore, the violations in this case are serious and extensive, and have affected virtually all of Respondents' employees throughout the period March 14, 2001 through October 20, 2001 during which contract-related work was being performed. Although the final dollar amount due Respondents' workers has yet to be finally calculated, the total amount of back wages and benefits due each worker will undoubtedly be significant, especially for the H-2B workers, most if not all of whom came to this country from Mexico because they were economically disadvantaged and had every reason to believe they would be treated honestly and fairly by their American employer. Instead, they were placed in substandard and overcrowded housing, for which they paid an exorbitant amount of rent, and were paid substantially less in wages and benefits than what Respondents' knew they were obligated to pay under the D.C. service contract. None of these workers have yet been paid any moneys owed them by Respondents, and undoubtedly some of them may never receive such funds because they have returned to Mexico and may no longer be located. Respondents' SCA violations have thus had a serious and extensive impact on unpaid employees.

Based on all the foregoing, I find there is thus nothing under Part III, indeed under any one of the three parts of the debarment test, which would warrant a finding of "unusual circumstances" to preclude debarment under the SCA. Debarment of Respondents will thus be imposed as ordered below.

C. Prejudgment Interest.

While neither the SCA nor CWHSSA contain provisions for the recovery of prejudgment interest, courts have awarded prejudgment interest to employees who have prevailed on their claims for SCA violations. *See United States v. Powers Bldg. Maintenance*, 336 F.Supp. 822-23 (W.D. Okla. 1972); *National Electro-Coating, Inc. v. Brock*, 109 Labor Cases (CCH) ¶35,106, 1988 WL 125784 (N.D. Ohio 1988) (upholding an award of prejudgment interest on SCA back wages); *see also Rodgers v. United States*, 332 U.S. 371, 373-74 (1974) (where a statute lacks an interest provision, the purpose of the statute and the nature of the award determine whether interest can be awarded). Inasmuch as it is within my discretion to do so, I grant DOL's request that prejudgment interest be awarded in this case on all back wages owed to Respondents' employees in an amount consistent with the findings set forth above. A grant of prejudgment interest will allow the employees to be fully compensated for the delay in the payment of wages. Interest is to be calculated from the moment when the violations began (March 14, 2001) and will continue to accrue until a judgment is issued in this case. Furthermore, the interest shall be

[164] Jones' testimony that he would have quickly corrected any violations had he only been contacted during the time work was being performed under the contract (Tr. 764-65), is belied by the fact that he has yet to repay *any* back wages or benefits to workers who are undeniably covered by the D.C. contract.

compounded annually. *See Robinson v. S.E. Pa. Transp. Auth*., 1993 WL 126449, *4 (E.D. Pa. 1993). However, because "the extent of the sum awarded [in prejudgment interests is] within the trial court's discretion," I find it is appropriate that, before computing the amount of prejudgment interest which is owed, DOL must deduct the $89,871.32 that was withheld by the Agency from unpaid funds owed Respondents under the contract from the total amount of back wages due. *Robinson,* 1993 WL 126449 at *4 (E.D. Pa. 1993). My decision to exclude this amount from the prejudgment interest computations is based on the fact that DOL has had control of these funds since April or May 2002 and chose, for whatever reason, to place this money in a non-interest bearing account (DOL Br. at 69). In support of its request for prejudgment interest on these funds, the Agency simply states that "[t]he fact that the Department of Labor requested withholding of contract funds does not preclude the Court from awarding prejudgment interest, because the purpose of awarding interest is to fully compensate the employees." *Ibid*. DOL does not, however, explain why the withheld funds could not have been placed in an interest-bearing account, or why employees to whom back wages are owed would not be fully compensated had that been done. It would thus be inappropriate to assess against Respondents prejudgment interest on the $89,971.32 in contract funds which were withheld by DOL.

Respondents also dispute the Agency's use of the rate applied by the IRS to income tax underpayments for the purpose of calculating prejudgment interest in this case (R. Br. at 34). However, this is DOL's standard method for calculating prejudgment interest, and the use of the IRS interest rate has been validated by the courts (Tr. 350-51, 375).[165] *EEOC v. County of* Erie, 751 F.2d 79 (2nd Cir. 1984) (upholding award of prejudgment interest at adjusted prime rate used by IRS for tax underpayments on amounts recovered as back wages under FLSA and Equal Pay Act);[166] *Powers Bldg. Maintenance Co.*, 336 F.Supp. at 823 (awarding prejudgment interest at IRS rate on amounts recovered for SCA violations). In *County of Erie*, the court stated that it was "well within the discretion of the district court" to order that this rate be used to calculated prejudgment interest "since the goal of a suit under the FLSA . . . is to make whole the victims of the unlawful underpayment of wages, and since the adjusted prime rate has been adopted as a good indicator of the value of the use of money." 751 F.2d at 82.

Respondents further assert that "[t]he Agency's seizure of Respondents [funds] without affording Respondents' a prior hearing before a neutral fact finder was a violation of Respondents' due process" (R. Br. at 34). However, the applicable regulation expressly authorizes a withholding of funds "prior to the institution of administrative proceedings by the Secretary." 29 C.F.R. § 4.187(a). Furthermore, Respondents' assertion is misplaced in light of the Supreme Court's recent determination that withholding of contract funds for wage violations

[165] Respondents also question the fact that while the revised Kelly spreadsheet contains a higher total amount of back wages than DOL's previous computations, it indicates a higher dollar amount for prejudgment interest (DX 24; Att. A). DOL correctly explained that "because interest accrues daily, the amount of interest would necessarily increase from the date of the last spreadsheets . . . and will continue to accrue until a judgment is issued" (DOL Br. 21-22).

[166] As this court explained, "[t]he adjusted prime rate, established periodically by the Secretary of the Treasury, is equivalent to 'the average predominant prime rate quoted by commercial banks to large businesses, as determined by the Board of Governors of the Federal Reserve System. 26 U.S.C. § 6621(c). It is the rate to be 'paid by taxpayers on tax deficiencies . . . and was established by Congress for use by the [IRS].'" *Ibid.;* 26 U.S.C. § 6621. Although this decision was made under the FLSA, the courts have adopted the rationale applied in the FLSA cases in resolving pre-judgment interest issues under the SCA. *Powers Bldg. Maintenance Co.*, 336 F.Supp. at 823.

does not constitute a due process violation. *See Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001). The Court held that an employer being sued for violations of California's Davis-Bacon Act was not denied due process because the statute provided the employer sufficient opportunity to pursue its claim for the return of the funds, while the disputed funds were being withheld by the government. *Id.* at 195. The Court assumed, without deciding, that the employer had a protectable property interest, but noted that the employer had not been deprived of a present entitlement to contract payments, but only of the funds that were subject to a dispute as to their proper ownership between the employer and the state alleging statutory violations. *Id.* at 196. The Court concluded that the employer's claim for payment could be adequately protected by an administrative proceeding similar to an ordinary breach-of-contract suit. *Ibid.* The same rationale justifies the withholding of Respondents' funds in this case.

Finally, Respondents claim that it is not appropriate for the Agency to retain any back wages due employees who cannot be located for payment. This claim, however, is contrary to the law. The SCA expressly authorizes the government to retain such funds and states that "any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States." *See* 41 U.S.C. § 354; 29 C.F.R. § 4.187 (c); *see also Amer. Waste Removal Co. v. Donovan*, 748 F.2d 1406, 1410 (10th Cir. 1984) (holding that an award of back wages to unnamed employees who could not be located did not constitute a penalty or fine and had to be paid to the U.S. Treasury in order to effectuate the purpose of the SCA). Thus, the law prevents employers from deriving a benefit from delaying payments, and this rationale is applicable to Respondents' case.

V. CONCLUSION

It has never been disputed by Respondents that they are liable for back wages and benefits owed certain of their employees for services performed under the contract which gave rise to this litigation. Respondents do not deny, and the evidence convincingly proves, that workers were not paid at the applicable minimum wage, were not provided with fringe benefits required by the contract, and were not adequately compensated for overtime and holidays worked. Yet despite their acknowledgement of liability, and the overwhelming evidence of their SCA and CWHSSA violations, Respondents have chosen to challenge virtually every aspect of the Agency's case from the time DOL's complaint was originally filed up through theparties' filing of their post-hearing briefs. In doing so, Respondents have caused the expenditure of substantial governmental resources, delayed but not avoided debarment, increased the amount of prejudgment interest they are now obligated to pay, and undoubtedly incurred significant legal fees and expenses, much of which could have been avoided had they chosen a different path. It is, of course, Respondents' absolute right to put the government to its burden of proof. Having done so, it is now time for them to make full restitution to their underpaid employees.

ORDER

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. The Agency shall calculate back wages and benefits owed by Respondents to their covered H-2B and non-H-2B workers for the period beginning March 14, 2001 and ending October 20, 2001 based on the findings set forth in Section IV. A. of this decision and order.

2. The Agency shall also compute the total prejudgment interest owed by Respondents up to the date of this decision and order consistent with my findings in Section IV. C. of this decision and order.

3. The Agency shall thereafter prepare and serve on Respondents, not later than thirty days from the date of this decision and order, revised spreadsheets reflecting its wages, benefits, and prejudgment interest computations with respect to each of the covered H-2B and non-H-2B workers identified in this decision and order.

4. Within fifteen days of receipt of the revised spreadsheets, Respondents shall meet with the Agency's representatives regarding any perceived errors in DOL's revised computations and shall make a good-faith effort to resolve any disputes with respect thereto. Following such meeting, if there are no disputes either with respect to the accuracy of DOL's computations or whether such computations comport with my findings in Sections IV. A. and C. of this decision and order, the Agency shall file with the court the revised spreadsheets so that a supplemental decision and order awarding back wages, benefits, and prejudgment interest may be issued.

5. In the event the parties are unable to resolve any dispute with respect to DOL's computations, Respondents shall submit within fifteen days of the meeting described in paragraph 4 above written objections to the Agency's computations specifically describing why particular computations do not comport with the findings contained in Sections IV A. and C. of this decision and order or why those computations are otherwise in error. Alternatively, within five business days of the meeting described in paragraph 4 above, the parties may contact my law clerk, Ms. Yelena Zaslavskaya, to arrange a conference with me to the extent they believe such a conference would lead to the resolution of any disputed computations.

6. Based on my findings contained in Section IV. B. above, there is no basis for recommending that the Secretary exclude Respondents from the ineligibility list under Section 5(c) of the SCA.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.